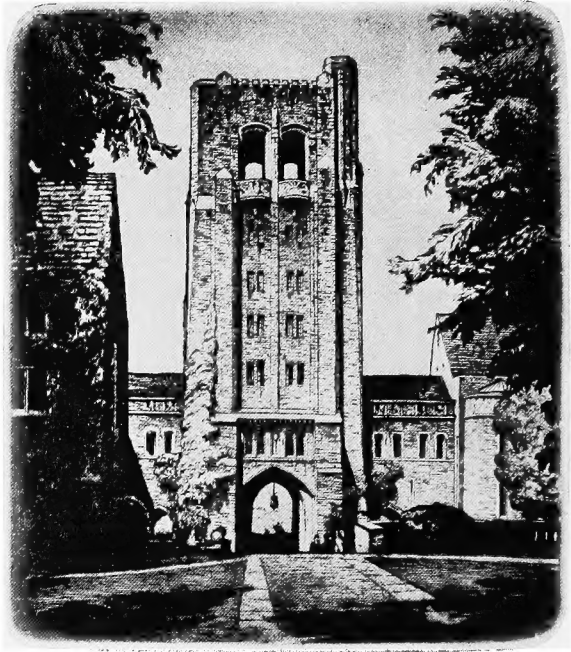


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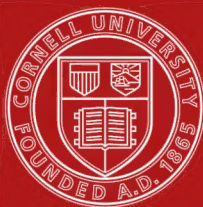
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FROM

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Edited by
RICHARD M. BRUNO,
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TABLE OF CASES REPORTED.

A

Adee v. Bigler.....	348
Alberts, Evans et al. v.....	230
Allen, Strauss & Co., <i>In re</i>	405
Anthony et al. v. Stype.....	271
Armstrong, Admr., et al. v. Croft et al.....	259

B

Bailey, Assignee, <i>In re</i>	268
Baker v. Palmer.....	67
Bartlett v. Blaine.....	53
Barton, Sheriff, Kingman v.....	88
Bassett v. Fahey.....	174
Bastian, Macungie Savings Bank v.....	484
Batthey, Tennent v.....	133
Bean et al., Rennie, Assignee, et al. v.....	420
Bell v. Lamprey.....	10
Benham, Sheriff. Worthy, As- signee, v.....	145
Bennett, Assignee, v. Ellison....	26
Benson, <i>In re</i>	301
Berg, Wilson v.....	169
Bergen v. Snedeker et al.....	341
Bigler, Adee v.....	348
Blaine, Bartlett v.....	53
Blatt et al., Rhoads v.....	45
Boese, Receiver, v. Locke et al.	209, 326
Bostwick, Assignee, v. Burnett..	118
Boyd et al. v. Smith.....	466
Brady, <i>In re</i>	102
Breese et al., Carr et al. v. 255,	379
Brockenbrough's exrx. et al. v. Brockenbrough's admr. et al..	233
Brennan et al. v. Willson et al....	77
Bryce et al., <i>In re</i>	186
Buderus, Weeks et al. v.....	38
Buffum et al., Hanscom v.....	39
Burnett, Bostwick, Assignee, v..	118
Burrows v. Keays.....	140
Bush v. U. S.....	487

C

Campbell, Laird v.....	304
Carr et al. v. Breese et al. 255,	379
Case, Stamp v.....	226
Chalfont v. Grant.....	251
Chambersburg Woolen Co. et al., Converseville Co. v.....	166
Charlton, Klauber, Assignee, v..	283
Chicago Building Society, Haas v.	201
Churchill, Assignee, v. Whipple et al.....	6
Clark v. Stanton.....	80
Cohn et al., <i>In re</i>	221
Coine, Assignee, v. Weaver, Sher- iff.....	392
Comfort, Trustee, v. Patterson..	241
Converseville Co. v. Chambers- burg Woolen Co. et al.....	166
Cornish, Fowler v.....	184
Cowan v. Mann.....	262
Croft et al., Armstrong, Admr., et al. v.....	259
Crouse et al. v. Frothingham et al.	441
Currier, <i>In re</i>	97

D

Davis, Assignee, v. Howell, As- signee.....	357
Dobschutz et al., Mueller, Exr., v.	69
Donahue et al., Stephenson's exrs. v.....	219
Donaldson, Keevil et al. v.....	153
Drake et al., Holland et al. v....	20
Dunham, Seymour et al., Assign- ees, v.....	386
Durr et al. v. Kelly et al.....	431

E

Earle et al., Solinger v.....	362
Ellison, Bennett, Assignee, v....	26
Evans et al. v. Alberts.....	230

F

Fahey, Bassett v.	174
Farnam, <i>In re</i>	127
Finck et al., <i>In re</i>	411
First National Bank of Newark v. Holmes et al.	150
Fitzgerald, <i>In re</i>	100
Flaurand et al., Lowenstein et al. v.	479
Forkner, Assignee, v. Shafer et al.	16
Fowle et al., Whitcomb et al. v. .	160
Fowler, <i>In re</i>	319
Fowler v. Cornish	184
Francis v. Rankin	52
Frazier v. Truax, Assignee	452
Frothingham et al., Crouse et al. v.	441
Fuller v. Steiglitz, Assignee	191

G

Gage, Stearns, Exr., v.	333
Gibbs v. Patton	252
Ginther et al., Assignees, v. Rich- mond	246
Goldsmith, Mellen et al. v.	298
Goodman v. Niblack	368
Grant, Chalfont v.	251
Greene, Assignee, v. The National Security Bank	120

H

Haas v. The Chicago Building So- ciety	201
Haines, Price v.	137
Halstead, Steinlein, Assignee, v.	474
Hanscom v. Buffum et al.	39
Hard v. Milligan	329
Hawks, Assignee, v. Pretzlaff ..	389
Healey et al., Schiele et al. v. .	417
Herbst & Buehler's Appeal	224
Holland et al. v. Drake et al. .	20
Holt, <i>In re</i>	18
Holmes et al., First National Bank of Newark v.	150
Horsfall, <i>In re</i>	156, 350
Howard National Bank v. King et al.	461
Howell, Assignee, Davis, As- signee, v.	357
Howell et al., Assignees, v. Teel et al.	130
Hulburt et al., <i>In re</i>	454

J

Johnson, Lahn et al. v.	1
Jones v. Syer et al.	289
Jordan et al., Assignees, v. Shar- lock	48

K

Keays, Burrows v.	140
Keevil et al. v. Donaldson	153
Kelly et al., Durr et al. v.	431
King, <i>In re</i>	351
King et al., Howard National Bank v.	461
Kingman v. Barton, Sheriff	88
Kington, Pillsbury, Assignee, v. .	274
Klauber, Assignee, v. Charlton ..	283
Kuykendall, Nimmo v.	106

L

Lahn et al. v. Johnson	1
Laird v. Campbell	304
Lamar Ins. Co. v. Moore	62
Lamprey, Bell v.	10
Leahy, <i>In re</i>	162
Leipziger, <i>In re</i>	147
Lester, Paine v.	91
Lewenthal et al., <i>In re</i>	99
Lewis, <i>In re</i>	352
Locke et al., Boese, Recr., v. .	209, 326
Longmire et al., Smith et al. v. .	424
Lowenstein et al. v. Flaurand et al.	479

M

McCloskey v. Stewart	468
McConnell v. Sherwood, Sheriff.	400
Macungie Savgs. Bk. v. Bastian.	484
McGovern, Rockwell v.	59
Mann, Cowan v.	262
Marquand, Assignee, <i>In re</i>	216
Martin et al., Assignees, v. Pills- bury et al.	42
Mellen et al. v. Goldsmith	298
Miller, Assignee, v. Mulford, As- signee	293
Milligan, Hard v.	329
Moore, <i>In re</i>	95
Moore, Lamar Ins. Co. v.	62
Mueller, Exr., v. Dobschutz et al.	69
Mulford, Assignee, Miller, As- signee, v.	293
Mumper, Admr., v. Rushmore, Sheriff	164

N

National Security Bank, Greene, Assignee, v.	120
Niblack, Goodman v.	368
Nimmo v. Kuykendall	106

O

Oakley, Assignee, <i>In re</i>	56
--------------------------------------	----

TABLE OF CASES REPORTED.

v

P

Palmer, Baker v.....	67
Paine v. Lester.....	91
Parsons v. Rhodes.....	354
Patterson, Comfort, Trustee, v..	241
Patton, Gibbs v.....	252
Pillsbury et al., Martin et al., As- signees, v.....	42
Pillsbury, Assignee, v. Kingon...	274
Platt, Assignee, Stewart et al. v.	308
Praim, Sheriff, Richmond, As- signee v.....	427
Pretzlaff, Hawks, Assignee, v...	389
Price v. Haines.....	137

R

Rankin, Francis v.....	52
Ransom, <i>In re</i>	73
Raymond, Assignee, <i>In re</i>	445
Rennie, Assignee, et al. v. Bean et al.....	420
Rhoads v. Blatt et al.....	45
Rhodes, Parsons v.....	354
Richmond, Ginther et al., As- signees, v.....	246
Richmond, Assignee, v. Praim, Sheriff.....	427
Rider, <i>In re</i>	397
Risley v. Smith, Assignee.....	281
Rockwell v. McGovern.....	59
Rosenthal, Talcott v.....	367
Rushmore, Sheriff, Mumper, Admr., v.....	164

S

Schiele et al. v. Healy et al.....	417
Seymour, Woodworth et al. v....	376
Seymour et al., Assignees, v. Dunham.....	386
Shafer et al., Forkner, Assignee, v.....	16
Sharlock, Jordan et al., As- signees, v.....	48
Shaw et al., Assignees, <i>In re</i>	244
Sherwood, Sheriff, McConnell v.	400
Shipman, Assignee, <i>In re</i>	413
Smith, Boyd et al. v.....	466
Smith et al. v. Longmire et al..	424

Smith, Assignee, Risley v.....	281
Smith v. Tighe et al.....	344
Smith, Tim et al. v.....	466
Snedeker et al., Bergen v.....	341
Solinger v. Earle et al.....	362
Stamp v. Case.....	226
Stanton, Clark v.....	80
Stearns, Exr., v. Gage.....	333
Steiglitz, Assignee, Fuller v.....	191
Steinlein, Assignee, v. Halstead.	474
Stephenson's exrs. v. Donahue et al.....	219
Stewart, McCloskey v.....	468
Stewart et al. v. Platt, Assignee.	308
Stockbridge, <i>In re</i>	292
Stype, Anthony v.....	271
Syer et al., Jones v.....	289

T

Talcott v. Rosenthal.....	367
Teel et al., Howell et al., As- signees, v.....	130
Tennent v. Battey.....	133
Tighe et al., Smith v.....	344
Tim et al. v. Smith.....	466
Truax, Assignee, Frazier v.....	452
True, <i>In re</i>	108

U

U. S., Bush v.....	487
--------------------	-----

W

Wainwright et al., Wallace et al. v.	110
Wallace et al. v. Wainwright et al.	110
Ward & Peloubet, <i>In re</i>	339
Weaver, Sheriff, Coine, As- signee, v.....	392
Weeks et al. v. Buderus.....	38
Weinboltz, <i>In re</i>	65
Whipple et al., Churchill, As- signee, v.....	6
Whitcomb et al. v. Fowle et al..	160
Willson et al., Brennan et al. v..	77
Wilson v. Berg.....	169
Woodworth et al. v. Seymour...	376
Worthy, Assignee, v. Benham, Sheriff.....	145

TABLE OF CASES CITED.

A

Adams v. Davidson, 10 N. Y., 309	396	Barbour v. Everson, 16 Abb., 366.	424
Adams v. Houghton, 3 Abb., N.S., 46	480	Bardwell v. Perry, 19 Vt., 292..	359
Adams v. Rodarmel, 19 Ind., 339.	196	Barney v. Baltimore City, 6 Wall, 280	375
Agra Bank v. Hoffman, 34 L. J. Ch., 285	122	Barney v. Griffin, 2 N. Y., 365, 245,	455
Aldrich v. Campbell, 4 Gray, 284	192	Barrett v. The Alton & S. R. R. Co., 13 Ill., 504	63
American Exchange Bank v. Julves, 7 Md., 380	291	Bassett v. Marshall, 9 Mass., 312.	289
Anderson v. Roberts, 18 Johns., 515	186	Bate v. Jordan, 11 N. Y., 237, 444,	448
Andriot, 2 Daly, 28	321	Bayard v. Hoffman, 4 Johns. Ch., 450	276
Angell v. Rosenburg, 12 Mich., 241	285	Bayley v. Clark, 2 Browne, 276..	366
Anon. v. Gelpcke, 5 Hun, 245...	396	Bean v. Bullitt, 7 P. F. Smith, 221	112
Anstey v. Marden, 1 B. & P., 124	300	Beard v. Kimball, 11 N. H., 471.	138
Astor v. Turner, 11 Paige, 436..	202	Beardsley Scythe Co. v. Foster, 36 N. Y., 561	349
Atkinson v. Derby, 7 H. & N., 934	364	Beaston v. Farmers' Bank, 12 Pet., 132	489

B

Babcock v. Booth, 2 Hill, 181...	448	Beckwith v. Union Bank, 9 N. Y., 211	196
Babcock v. Eckler, 24 N. Y., 623.	385	Beckman v. Gibbs, 8 Paige, 511.	342
Bailey, 58 How., 446	412	Beeler v. Turnpike Co., 2 Harris, 162	50
Baker v. Bliss, 39 N. Y., 70	337	Bell v. Fleming, 1 Beas., 14, 490.	131
Baldwin v. Johnson, Saxt., 441..	280	Bell v. Lamprey, 52 N. H., 41..	13
Baldwin v. Tynes, 19 Abb. Pr., 32	480	Bell v. Newman, 5 S. & R., 78..	359
Ball v. Loomis, 29 N. Y., 412...	165	Bellows v. Patridge, 19 Barb., 176	74
Banfield v. Whipple, 14 Allen, 13.	31	Benedict v. Huntington, 32 N. Y., 219	248, 394
Bank of Augusta v. Erle, 13 Pet., 591	198	Bennett v. Chapin, 3 Sandf., 673.	455
Bank of Mt. Joy v. Gish, 12 P. F. Smith, 13	121	Bennett v. Cook, 43 N. Y., 537 ; 3 Am., 737	13
Bank of Northern Liberties v. Jones, 6 Wright, 541	121	Berkey v. Judd, 22 Minn., 287..	34
Bank of U. S. v. Housman, 6 Paige, 526	384	Berry v. Arthur, 1 Green, 308...	39
Bank of Utica v. Card, 7 Ohio, 170	199	Bigelow v. Folger, 2 Metc., 255, 49,	192
		Bills v. Stanton, 69 Ill., 51	107
		Blabon v. Lewis, 3 Phila., 454..	113
		Black's Appeal, 44 Pa. St., 503..	359
		Blakesley's Appeal, 7 Barr, 449..	171
		Blancke v. Rogers, 11 C. E. Green, 563	297

Blight v. Schenck, 10 Barr, 285..	152	Campbell v. The Erie R. Co., 46 Barb., 540.....	109
Bockes v. Lansing, 74 N. Y., 437.	344	Campbell v. Woodworth, 24 N. Y., 304.....	245, 394, 455
Boese v. King, 78 N. Y., 471....	462	Canal & Walker Streets, 12 N. Y., 406.....	105
Bolton v. Lawrence, 9 Wend., 435.....	456	Carpenter v. Roe, 10 N. Y., 227.	257, 383
Bond v. Ward, 7 Mass., 123.....	440	Carr v. Bank, 16 Wis., 50.....	288
Borland v. Mayo, 8 Ala., 104....	437	Carraharan v. Hart, 21 Pa. St., 435.....	435
Bosler v. Exchange Bank, 4 Barr, 32.....	50, 121	Carver's Appeal, 36 Leg. Int., 331.	226
Bostwick v. Burnett, 18 Alb. L. J., 418.....	213	Case v. Phelps, 39 N. Y., 164.	257, 382
Bowman v. Bell, 14 Sim., 392....	204	Caskie v. Webster, 7 Wall., 131..	464
Boyd v. Hind, 1 H. & N., 938....	306	Catlin v. Grissler, 57 N. Y., 363.	456
Bradley v. Angel, 3 N. Y., 475....	44	Chaffees v. Risk, 12 Harris, 432.	112
Bradley v. Gregory, 2 Camp., 363.	300	Chamberlain v. West Transp. Co., 44 N. Y., 305.....	455
Brady, 8 Hun., 437; 69 N. Y., 215.....	325	Chandler v. Bunn, Lalor, 169....	311
Brainerd v. Dunning, 30 N. Y., 211.....	394	Chase v. James, 16 Hun, 14.....	246
Brazblow v. Brooks, 2 Head, 194.	125	Chautauqua Co. Bk. v. Risley, 19 N. Y., 369.....	343
Breed v. Lyman, 4 Allen, 170....	14	Cheever v. The R. & B. R. Co., 39 Vt., 654.....	202
Brennan v. Willson, 1 Am. Ins., 77; 4 Abb. N. C., 279; 71 N. Y., 502.....	129, 377, 424	Choate v. Hathaway, 73 Ill., 518.	107
Briggs v. Davis, 20 N. Y., 15; 21 N. Y., 574.....	79	Chouteau v. Suydam, 21 N. Y., 179.....	395
Brigham v. Tillinghast, 15 Barb., 618.....	74	Churchill v. Whipple, 41 Wis., 611.	286
Brigham v. Tillinghast, 13 N. Y., 215.....	36, 405	Claffin v. Maglaughlin, 15 P. F. Smith, 492.....	112
Brinckerhoff v. Wemple, 1 Wend., 470.....	79	Clark v. Brooks, 1 Abb. Ct. of App. Dec., 355.....	456
Britton v. Lorenz, 45 N. Y. 51. 7, 422, 480	480	Clark v. Iselin, 21 Wall., 360....	317
Brooks v. Marbury, 11 Wheat., 78.	34	Clark v. Stanton, 1 Am. Ins., 61; 2 N. W. Rep., 28.....	89
Brown v. Bisst, 1 Zab., 46.....	358	Clarke v. Hawkins, 5 R. I., 219..	125
Brown v. Chase, Walker Ch., 43.	203	Cockshott v. Bennett, 2 T. R., 763.....	363
Brown v. Force, 7 B. Mon., 357.	437	Coine v. Weaver, 1 Am. Ins., 392.	401
Brown v. Heathcote, 1 Atk., 160.	312	Colyer v. Craig, 11 B. Mon., 73..	44
Brown v. Smith, 7 B. Mon., 361.	437	Comrs. of Central Park, 50 N. Y., 493.....	105
Brown v. Stackpole, 9 N. H., 478.	301	Concord v. Atlantic Ins. Co., 1 Pet., 438.....	489
Browne v. Bradley, 5 Abb., 141.	428	Conrad v. Bank, 1 Binn., 64.....	121
Brownell v. Curtiss, 10 Paige, 210. 186, 277, 448	448	Cook v. Kelley, 14 Abb., 466, 466,	480
Browning v. Hart, 6 Barb., 91....	186	Cook v. Tullis, 18 Wall., 332....	313
Bullymore v. Cooper, 2 Lans., 71.	428	Cortelyou v. Hathaway, 3 Stockt., 41.....	204
Bullymore v. Cooper, 46 N. Y., 236.....	427	Cowan v. Stokes, 26 How., 84....	96
Bunch, 12 Wend., 280.....	455	Cram v. Mitchell, 1 Sandf. Ch., 251.....	285
Burtis v. Dodge, 1 Barb. Ch., 77.	456	Cramond v. Bank of U. S., 1 Binn., 64.....	50
Butler v. Lee, 3 Keyes, 70.....	456	Crawford v. Austin, 34 Md., 49..	32
Butler v. Rhodes, 1 Esp., 236....	301	Crawford v. Kirskey, 55 Ala., 282.	435
C		Crewe v. Picken, 4 Ves., 97.....	79
Cairns v. Chabert, 9 Paige, 160..	455	Croft v. Brandt, 58 N. Y., 106..	456
Callaman v. Shaw, 19 Ia., 183....	203	Crosby v. Hillyer, 24 Wend., 280.	421
Cammack v. Johnson, 1 Green Ch., 163.....	358		
Camp v. Grant, 21 Conn., 41....	359		

TABLE OF CASES CITED.

ix

Croton Ins. Co., 3 Barb. Ch., 642.	396	Edwards v. Hancher, L. R., 1 C. P. D., 111.	149
Crowder, 2 Vern., 706.	358	Ely v. Cooke, 28 N. Y., 365.	61
Cruger v. Halliday, 11 Paige, 314.	78	Emanuel v. Bird, 19 Ala., 596.	359
Crumbauch v. Kugler, 2 Ohio St., 373.	220	Embry v. Robinson, 7 Humph., 444.	267
Curren, 8 Daly, 122.	458	Engelbert v. Blanjet, 2 Whart., 240.	112, 277
Currie v. Hart, 2 Sandf. Ch., 353.	285	Erickson v. Quinn, 15 Abb., N. S., 166.	344
Curtis v. Hollingshead, 2 C. E. Green.	358	Erwin v. U. S., 97 U. S., 392.	371
Cuyler v. McCartney, 40 N. Y., 221.	396	Estabrook v. Messersmith, 18 Wis., 551.	186, 391
D		Estes v. Wilcox, 67 N. Y., 264.	350
Dale v. Allen, 4 Greenl., 527.	289	Evans v. Chapin, 20 How. Pr., 289.	424
Dana v. Lull, 17 Vt., 390.	21	Eyster v. Gaff, 91 U. S., 521.	346
Darrow v. Bruff, 36 How. Pr., 479.	480	F	
Darvill v. Terry, 6 H. & N., 807.	31	Fairchild v. Gwynne, 16 Abb., 28.	421
Davidson v. Little, 10 Harris, 245.	47	Fallon's Appeal, 6 Wright, 235.	114
Davis, 2 N. B. R., 392.	409	Farmers' & Mech. Bank's Appeal, 12 Wright, 57.	50, 121
Deckert v. Filbert, 3 W. & S., 454.	21	Farnam, 75 N. Y., 187.	424
Deming v. Colt, 3 Sandf., 284; 2 Id., 292.	21	Farrington v. Hogdon, 119 Mass., 453.	301
Denman v. Boylston Bank, 5 Cush., 194.	124	Fellows v. Stevens, 24 Wend., 294.	301
De Peyster, 4 Sandf. Ch., 511.	455	Finch v. Houghton, 19 Wis., 150.	203
Dewey v. Moyer, 72 N. Y., 70.	445	Finney v. Finney, 4 Harris, 380.	113
Dickerson v. Benham, 20 How., 343.	273	Fisher v. Murray, 1 E. D. Smith, 341.	21, 480
Dinkerhoff v. Ahlborn, 2 Abb. N. C., 73.	101	Flanigan v. Wetherill, 5 Whart., 285.	113
Dole v. Olmstead, 41 Ill., 344.	183	Fletcher v. Morey, 2 Story, 555.	409
Donaldson v. Farwell, 93 U. S., 631.	313	Follett v. Buyer, 4 Ohio St., 591.	192
Donaldson v. Wood, 22 Wend., 395.	455	Fogarty v. Trust Co., 25 P. F. Smith, 125.	121
Dorsheimer v. Busher, 7 S. & R., 9.	192	Fort Stanwix Bk. v. Leggett, 51 N. Y., 552.	444
Doty v. Brown, 4 N. Y., 71.	377	Fowler, 5 Daly, 548.	351
Dow v. Platner, 16 N. Y., 562.	395	Fox's Appeal, 37 Leg. Int., 323.	487
Downing v. Marshall, 37 N. Y., 380.	456	Fox v. Adams, 5 Greenl., 245.	93
Drake v. Rogers, 6 Mo., 317.	21	Francklyn v. Sprague, 10 Hun, 589.	167
Dreisbach v. Becker, 10 Casey, 153.	112	Frantz v. Brown, 1 Pen. & W., 257.	123
Duffy v. Duncan, 35 N. Y., 187.	455	Frazier v. Erie Bank, 8 W. & S., 18.	121
Dundas v. Bowler, 3 McLean, 397.	198	Frederick v. Clark, 5 Wis., 191.	288
Dunlap v. Hawkins, 59 N. Y., 342.	382	Freeman v. Pope, L. R., 5 Ch. App., 538.	221
Dunlevy v. Tallmadge, 32 N. Y., 457.	349	Fulton's Estate, 1 P. F. Smith, 204.	50, 121
Dunlop v. Rogers, 47 N. H., 281.	93	Funnell v. Nesbitt, 16 B. Mon., 351.	195
Dyer v. Clark, 5 Met., 562.	280	G	
E		Gardner v. Gardner, 7 Paige, 112.	449
Earl v. Halsey, 1 McCart., 332.	297	Gardner v. Lewis, 7 Gill, 377.	301
Eastman v. Bennett, 6 Wis., 232.	288		
Edwards v. Coombe, L. R., 7 C. P., 519.	149		

xi

Jenkins v. Fowler, 12 Harris, 308; 4 Casey, 176	172	Lindsay v. Jackson, 2 Paige, 581.	44, 388
Jerome v. McCarter, 94 U. S., 739	313, 346	Linford v. Linford, 4 Dutch., 113.	358
Jewett v. Woodward, 1 Ed. Ch., 195	404, 455	Livermore v. Rhoades, 27 How. Pr., 506	273
Johnson v. Herring, 10 Wright, 415	152	Livingston v. Meldrum, 19 N. Y., 440	342
Jones v. Yates, 9 B. & C., 532	391	Lloyd v. Bennett, 8 C. & P., 124.	153
Jordan v. Natl. S. & L. Bank, 74 N. Y., 467	388	Lockwood v. Beckwith, 6 Mich., 168	126
Jordan v. Sharlock, 1 Am. Ins., 48; 3 Norris, 368	125, 486	Lynch v. Crary, 52 N. Y., 181	426
Juliand v. Rathbone, 39 N. Y., 369	7, 78, 90, 129, 146, 378	Lytle, 14 N. B. R., 457	410
Julves v. American Exchange Bk., 11 Md., 173	291		
		M	
K		Maas v. O'Brien, 14 Hun, 95	101
Kanaghan v. Taylor, 7 Ohio St., 134	199	McCabe v. Grey, 20 Cal., 509	48
Keep v. Lord, 2 Duer, 78	126	McClung v. Johnson, 2 L. & Eq. R., 78	254
Kelly v. Crapo, 45 N. Y., 86	93	McCormack's Appeal, 55 Pa. St., 252	359
Kemp v. Carnley, 3 Duer, 1	21	McCune v. House, 8 Ohio, 144	199
Kendig v. Dean, 97 U. S. 423	376	McDonald v. Black, 20 Ohio, 196	195
Kensley v. Cole, 16 M. & W., 128	72	McElwain v. Willis, 9 Wend., 548.	109, 349
Kerr v. Blodgett, 48 N. Y., 62.	56, 269	McGlone v. Prosser, 21 Wis., 273.	7
King v. Johnson, 5 Harr., 31	93	McWhorter v. Benson, Hopk. Ch., 28	455
King v. Talbot, 40 N. Y., 76	395	Malcolm v. Hodges, 8 Md., 418	291
King v. West, 10 How. Pr., 333	343	Maltbie v. Hotchkiss, 38 Conn., 80.	213
Kirby v. Ingersoll, Har. Ch., 172	21	Mann v. Pentz, 3 Coms., 422	485
Kirby v. Schoonmaker, 3 Barb. Ch., 46	418	Many v. Scott, 1 Mod., 132	321
Klauber v. Charlton, 1 Am. Ins., 283; 45 Wis., 600	284, 478	Marbury v. Brooks, 7 Wheat., 556	34
Klinck v. Kelly, 63 Barb., 622	165	Marks' Appeal, 4 Norris, 231	172
Krause v. Beitel, 3 Rawle, 199	123	Marr v. Bank of West Tenn., 4 Cold., 471	242
Kyle v. Kyle, 67 N. Y., 400	449	Marr v. Dungan, 11 S. & R., 75	122
		Martin v. Kunzmueller, 37 N. Y., 396	44, 194
		Marvin v. Smith, 46 N. Y., 571	79
		Matlack v. James, 2 Beas., 126.	280, 358
L		Maughlin v. Tyler, 47 Md., 545	291
La Chevelier v. Lynch, Doug., 170	191	Mayer v. Hellman, 91 U. S., 496.	214, 329, 346, 410
Lamont v. Cheshire, 65 N. Y., 30	344	Meacham v. Sternes, 9 Paige, 298.	244, 455
Lane v. Lutz, 1 Keyes, 203	313	Mech. & Traders' Bk. v. Dakin, 51 N. Y., 519; 8 Hun, 431	426
Lanning v. Streeter, 57 Barb., 33	109	Meech v. Allen, 17 N. Y., 300	132
Lawrence v. Bank of the Republic, 35 N. Y., 320	109	Mellon's Appeal, 8 Casey, 121	151
Lawrence v. Davis, 3 McLean, 177	198	Mendel v. Durbin, 26 Wis., 390	477
Lazell v. Powell, Thomp. Cas., 198	252	Metcalf v. Van Brunt, 37 Barb., 621	162
Leach v. Kelsey, 7 Barb., 466	186	Miller v. Mackenzie, 13 N. B. R., 496; 2 W. Dig., 205	149
Lederer v. R. R. Co., 38 Wis., 254	289	Miller v. Mackenzie, 2 Stew., 291.	276
Leicester v. Rose, 4 East, 372	363	Miller v. Receiver of Franklin Bk., 1 Paige, 444	243
Levy, 1 Abb. N. C., 177	446	Miller v. Wilson, 15 Ohio, 108	220
Lewis v. Stout, 22 Wis., 235	478		

Milliken v. Dart, 26 Hun, 24....	467	Ogden v. Murray, 39 N. Y., 202,	455
Mills v. Argall, 6 Paige, 577.....	162	245, 455	
Milne v. Moreton, 6 Binn., 361...	93	Ogden v. Prentice, 33 Barb., 160.	196
Mims v. Armstrong, 31 Md., 87...	139	O'Hara v. Jones, 46 Ill., 288....	183
Miners' Natl. Bk., 7 P. F. Smith,		Oliver v. Townes, 14 Martin, 93.	199
193.....	112	Osborne v. Moss, 7 Johns., 161.	
Mitchell v. Winslow, 2 Story, 630.	312	275, 448	
Mittnacht v. Smith, 2 C. E. Green,			
259.....	358		
Morgan v. Bank of North America,			
8 S. & R., 72.....	123, 192		
Morgan v. Skidmore, 55 Barb.,			
263.....	359		
Morris v. Ward, 36 N. Y., 587....	61		
Morris v. Wheeler, 45 N. Y., 708.	456		
Morrow v. Bright, 20 Mo., 299....	125		
Morse v. Huntington, 40 Vt., 468.	72		
Mosely v. Williamson, 5 Heisk,			
278.....	242		
Moses v. Thomas, 2 Dutch., 124...	131		
Mullen v. Wilson, 44 Pa., 413.			
257, 384			
Murphy's Appeal, 2 Pittsb., 271..	112		
Murray, 6 Paige, 204.....	416		
Murray v. Snow, 37 Ia., 410.....	301		
Murray v. Williamson, 3 Binn.,			
135.....	50, 123		
Murrill v. Neill, 8 How., 414.....	359		
Mutual Life Ins. Co. v. Bowen, 47			
Barb., 618.....	343		
Myers v. Davis, 22 N. Y., 489..	121, 192		
Myers v. Estel, 48 Miss., 372....	202		
Myers v. Kinzie, 26 Ill., 36.....	176		
N			
National Bk. of Baltimore v. Sack-			
ett, 2 Daly, 395.....	480		
National Bk. of Metropolis v.			
Sprague, 5 C. E. Green, 13..	132, 360		
Nellis v. Clark, 4 Hill, 424.....	364		
Newell v. Van Praagh, L. R., 9			
C. P., 96.....	149		
N. Y. C. R. R. v. Marvin, 11 N.			
Y., 276.....	105		
Nicholas, 15 Hun, 317.....	250		
Nichols v. Kribs, 10 Wis., 76....	392		
Nichols v. McEwen, 17 N. Y., 22.			
245, 455			
Nicholson v. Leavitt, 6 N. Y.,			
510.....	36, 353, 405		
Norman v. Thompson, 4 Exch.,			
755.....	300		
Nye v. Van Huse, 6 Mich., 329.	139		
O			
Oakley, 1 Am. Ins., 56.....	269		
Ocean Bk. v. Olcott, 46 N. Y., 12.			
347, 349			
Ogden v. Murray, 39 N. Y., 202,			
245, 455			
Ogden v. Prentice, 33 Barb., 160.	196		
O'Hara v. Jones, 46 Ill., 288....	183		
Oliver v. Townes, 14 Martin, 93.	199		
Osborne v. Moss, 7 Johns., 161.			
275, 448			
P			
Paddleford v. Thacher, 48 Vt.,			
574.....	301		
Page v. Smith, 24 Wis., 368....	7		
Palmer v. Meyers, 43 Barb., 509.	480		
Parker v. Muggridge, 2 Story,			
334.....	409		
Parsons v. Bowdoin, 17 Wend.,			
14.....	456		
Partridge v. Stokes, 66 Barb.,			
586.....	257		
Pearpoint v. Graham, 4 Wash.,			
C. C., 232.....	21		
Peck v. Jenness, 7 How., 612....	409		
Penniman v. Cole, 8 Met., 496..	42		
People v. Holbrook, 13 Johns., 90.	142		
People v. Kent, 1 Doug., 42.....	142		
People v. Smith, 45 N. Y., 783..	482		
People v. White, 14 How. Pr.,			
500.....	324		
People ex rel. Gelsten v. Brooks,			
40 How. Pr., 165.....	102		
Peters v. Sloan, 2 Vern., 428....	122		
Phillips v. Wooster, 36 N. Y.,			
412.....	384		
Poorman v. Goswiler, 2 Watts,			
69.....	50		
Porter v. Clark, 12 How. Pr., 107.	448		
Potter v. Brown, 5 East, 131....	92		
Powers v. Green, 14 Ill., 387....	107		
Price v. Barker, 4 Ell. & Bl., 760.	72		
Produce Bk. v. Morton, 52 How.			
Pr., 157.....	146		
R			
Randolph v. Daly, 1 C. E. Green,			
313.....	132, 360		
Rapalje v. Stewart, 27 N. Y., 310.	249		
Read v. Robinson, 6 W. & S., 329.	152		
Receivers v. Patterson Gas Co., 3			
Zab., 238.....	124		
Regina v. Pickery, 9 C. & P., 124.	288		
Reichwald v. Gaylord, 73 Ill.,			
503.....	107		
Reiley v. Johnson, 22 Wis., 279.	392		
Rex v. Rivers, 7 C. & P., 177....	288		
Rex v. Smith, 1 Stark., 242.....	288		
Rhoads v. Blatt, 16 N. B. R., 32.	138		
Riches v. Evans, 9 C. & P., 640..	32		
Roberts v. Carter, 38 N. Y., 107.	196		

TABLE OF CASES CITED.

xiii

Robinson v. Gould, 11 Cush., 57.	366	Stair v. York City Bank, 5 P. F. Smith, 368.	121
Robinson v. Gregory, 29 Barb., 560.	23	State ex rel. Cothren v. Lean, 9 Wis., 292.	477
Rockwell v. Brown, 54 N. Y., 210.	62	Steinman v. Magnus, 2 Camp., 124.	306
Rose v. Hart, 2 Smith Lead. Cas., 293.	197	Stewart v. Anderson, 6 Cranch, 203.	192
Rucker v. Robinson, 38 Mo., 154.	72	Stewart v. McMinn, 5 W. & S., 100.	7
Rundlet v. Doll, 10 N. H., 458.	138	Storm v. Davenport, 1 Sandf. Ch., 135.	277
S		Striker v. Mott, 28 N. Y., 82.	62
Sands v. Codwise, 4 Johns., 536.	444	Striker v. Stiles, 14 Pet., 322.	62
Savage v. Murphy, 34 N. Y., 508.	257, 382	Stuart v. Commonwealth, 8 Watts, 74.	50
Sawyer v. Hoag, 17 Wall., 610.	486	Swartwout v. Curtis, 4 N. Y., 415.	456
Sawyer v. Turpin, 91 U. S., 114.	317	Syracuse, &c., R. R. Co. v. Collins, 1 Abb. N. C. 47; 57 N. Y., 641.	78, 129
Schafer v. Reilly, 50 N. Y., 61.	343	T	
Schell, 53 N. Y., 263.	245	Talcott v. Rosenthal, 1 Am. Ins. 367; 22 Hun, 573.	467
Schenck v. Dart, 22 N. Y., 420.	455	Taylor v. Cornelius, 10 P. F. Smith, 187.	112
Scott v. Coleman, 5 Litt. (Ky.), 349.	138	Taylor v. Jones, 42 N. H., 25.	440
Scull v. Alter, 1 Harr., 147.	358	Thatcher v. Candee, 4 Abb. Ct. App. Dec., 387.	79
Sea Ins. Co. v. Stebbins, 8 Paige, 565.	202	Thomas v. Davies, 11 Beav., 29.	205
Shand v. Hanley, 71 N. Y., 319.	257, 383	Thompson v. Dougherty, 12 S. & R., 448.	277
Shaw, 18 Hun, 195.	455	Thompson v. Hintgen, 11 Wis., 112.	392
Shears v. Sorhinger, 10 Abb., N. S., 287.	214	Thornton v. Davenport, 1 Scam., 296.	53, 107
Sheldon v. Dodge, 4 Den., 217.	453	Thrasher v. Bently, 59 N. Y., 649; 1 Abb. N. C., 39.	78, 129, 146, 212, 329, 346, 410, 424
Sheldon v. Smith, 28 Barb., 593.	22	Thurber v. Blanck, 50 N. Y., 80.	426
Shepard v. Trowgood, 1 T. & R., 380.	74	Tilson v. Terwilliger, 56 N. Y., 273.	396
Shepardson's Appeal, 36 Conn., 23.	213	Tilton v. Beecher, 59 N. Y., 176.	456
Shepherd v. McEvers, 4 Johns. Ch., 136.	78	Tomlinson's Appeal, 36 Leg. Int., 354.	226
Shields v. Barrow, 17 How., 130.	375	Tompkins v. Hyatt, 19 N. Y., 534.	456
Shumway v. Butler, 8 Pick., 443.	440	Townsend v. Morrell, 10 Wend., 578.	320
Shurts v. Howell, 30 N. J. Eq., 418.	261	Townsend v. Stearns, 32 N. Y., 209.	248, 394
Singerly v. Fox, 25 P. F. Smith, 50.	50	Tripp v. Garey, 7 Greenl., 266.	289
Smith v. Acker, 23 Wend., 653.	313	Tubb v. Williams, 7 Humph., 367.	252
Smith v. Bromley, 2 Doug., 696.	364	Tunno v. Trezevant, 2 Dessaus., 264.	359
Smith v. Cuff, 6 M. & S., 160.	364	Turner v. Jaycox, 40 N. Y., 470.	419
Smith v. Felton, 43 N. Y., 419.	388		
Smith v. Johnson, 26 P. F. Smith, 191.	172		
Smith v. Mitchell, 12 Mich., 180.	139		
Smith v. St. Louis Life Ins. Co., 2 Tenn. Ch., 737.	242		
Sorwell v. Jewett, 9 Ohio, 180.	198		
Southard v. Benner, 72 N. Y., 424.	333		
Speed v. May, 17 Pa. St., 91.	464		
Spencer v. Armstrong, 12 Heisk., 707.	261		
Spofford v. Kirk, 97 U. S., 484.	371		
Staats v. Bristow, 73 N. Y., 264.	332		

Twelves v. Williams, 3 Whart., 492	151
--	-----

U

U. S. v. Canal Bank, 3 Story, 81.	490
U. S. v. Fisher, 2 Cranch, 390...	489
U. S. v. Gillis, 95 U. S., 407....	371
U. S. v. Hool, 3 Cranch, 90.....	489
U. S. v. McLellan, 3 Sumn., 350.	490
Upton v. Hubbard, 28 Conn., 274.....	93

V

Vallance v. Miners' Life Ins. Co., 6 Wright, 441.....	117
Van Alstyne v. Cook, 25 N. Y., 489	162
Van Buren v. Chenango Ins. Co., 12 Barb., 671.....	455
Vanderveer v. Conover, 1 How., 487	131
Van Dyke v. Christ, 7 W. & S., 373.....	277
Van Keuren v. McLaughlin, 6 C. E. Green, 163.....	276
Van Vleet v. Slauson, 45 Barb., 317	424
Van Wyck v. Seward, 6 Paige, 62	384
Veiley v. Hoag, 24 Vt., 46.....	72
Villamy v. Noble, 3 Meriv., 621.	122
Von Hein v. Elkus, 8 Hun, 516..	146

W

Wade v. Wade, 2 Tenn. Leg. R., 10.....	254
Wagstaff v. Lowerre, 23 Barb., 209	455
Wakeman v. Grover, 4 Paige, 23.....	401
Walker v. McKay, 2 Met. (Ky.), 294	196
Warner v. Gouverneur's exrs., 1 Barb., 36.....	202
Watchman, The, Ware, 232.....	93
Watson, 69 N. Y., 536.....	293
Watson, 2 E. D. Smith, 429.....	324
Watson v. Bagaley, 2 Jones, 164.	114
Wayne v. Sands, 1 Freem., 351..	366
Webb v. Roff, 9 Ohio St., 430....	220
Weinboltz, 1 Am. Ins., 65.....	269
Weinhaus, 5 Abb. N. C., 355....	456
Welles v. March, 30 N. Y., 344..	480

Wells v. Stewart, 3 Barb., 40.....	126, 196
Westcott v. Gunn, 4 Duer, 107...	313
Wetmore v. Parker, 52 N. Y., 450	456
White v. Smith, 77 Ill., 354.....	64
Whittlesey v. Frantz, 74 N. Y., 456	128
Wiggins v. Armstrong, 2 Johns. Ch., 144.....	349
Wild v. Bergen, 16 Hun, 128....	356
Wilder v. Keeler, 3 Paige, 167...	359
Wilkes v. Ferris, 5 Johns., 335..	138
Williams v. Ins. Co., 9 How. Pr., 365	7
Williamson v. Brown, 15 N. Y., 354	337
Williamson v. Brown, 2 Keyes, 486	192
Willink v. Vanderveer, 1 Barb., 599	443
Willis v. Henderson, 4 Scam., 13	183
Willits v. White, 25 N. Y., 577..	93
Willson v. Pearson, 20 Ill., 81.	108, 176
Wilson v. Britton, 26 Barb., 562.	273
Wilson v. Robertson, 21 N. Y., 587	419
Winsor v. McLellan, 2 Story, 492	313
Wisham v. Lippincott, 1 Stockt., 353.....	132, 360
Woddrop v. Price, 3 Dessaus., 203	359
Wolverhampton Bk. v. Marston, 7 H. & N., 148.....	32
Wood v. Dammer, 3 Mason, 308..	485
Wood v. Dixie, 4 Q. B., 892.....	31
Wood v. Roberts, 3 E. C. L., 411; 2 Stark, 417.....	300, 306
Worman v. Woolfersberger's exrs., 7 Harris, 59	171
Woven Tape Skirt Co., 85 N. Y., 506	455
Wright v. Vernon, 3 Drew, 112..	205

Y

Yeatman v. Savings Inst., 95 U. S., 764.....	312, 346
York Co. Bk. v. Carter, 2 Wright, 446	117
Young v. Heermans, 66 N. Y., 374	443

THE AMERICAN INSOLVENCY REPORTS.

VOLUME I.

SUPREME COURT COMMISSION—OHIO.

MAY 15, 1878.

An assignment for the benefit of creditors devotes all the property covered by it to the creditors who have their claims allowed pursuant to the act regulating the administration of assignments, to the exclusion of those who do not.

In an action brought by a creditor whose claim has been duly allowed, on an assignee's bond for a failure to account for any of the property assigned, the amount of recovery cannot be limited to an amount proportionate to the whole amount of the claims of all the creditors, including those not allowed as required by the statute, but the amount of recovery must be controlled by the proportionate amount of his claim to the whole amount of those only which have been presented and allowed pursuant to the statute.

JOHN LAHN et al. v. WILLIAM JOHNSON.

ERROR to the Court of Common Pleas of Stark County reserved in the District Court.

The original action was brought by William Johnson against John Lahn, U. R. Feather and H. R. Wise, in the Court of Common Pleas of Stark County, on a bond for fifty thousand dollars given by Lahn as assignee of Nixon & Co., with the other defendants as his sureties, conditioned that the said Lahn should well and truly, and according to law, perform all and singular the duties devolved upon him in the acceptance of the trust, and truly and correctly account for and pay over all moneys that came to his hands as such assignee.

The assignee entered upon the discharge of his duties

Lahn et al. v. Johnson.

April 20, 1871, and received a large amount of property under the assignment. On the 2d day of September, 1871, the plaintiff presented his claim of one thousand one hundred dollars against the assignors, duly verified by his oath, to the assignee for allowance, but the same was rejected by the assignee. He therefore brought suit against the assignee for its allowance, pursuant to the statute, and the court ordered the assignee to allow the claim as a valid one against the assets of Nixon & Co., in his hands.

After more than eight months had elapsed from the time of the acceptance of the trust by the assignee, the plaintiff demanded payment, which was refused by the assignee. The plaintiff thereupon caused a citation to be issued by the Probate Court to compel him to settle and account for the assets in his hands as such trustee, which he neglected and refused to do. The assignee having transferred all the assets back to the assignors, the plaintiff brought this suit on the bond.

According to the inventory filed by the assignee, the assets of Nixon & Co. that came to his hands amounted to seventy-seven thousand two hundred and fifty-two dollars and thirty-two cents, and the debts amounted to two hundred and thirty-eight thousand and ninety-eight dollars and two cents, as shown by the books of the company. Only about forty thousand dollars of the debts were presented to the assignee for allowance pursuant to the statute.

As to the disposition of the property, the assignee testified on the trial as follows:

"On the 13th day of July, A. D. 1871, about three months after I was appointed trustee, the creditors, who represented at least two hundred and thirty-six thousand dollars of the indebtedness of Nixon & Co., came to me in person and exhibited to me their claims, and requested me to reconvey and redeliver to said Nixon & Co. the property and effects included in their assignment, and gave me written releases from all liabilities or damages on account of their claims, if I would so redeliver to said company the property assigned by them. As there were only two thousand dollars of debts against said company not so

Lahn et al. v. Johnson.

represented, and as Nixon & Co. agreed to protect me against any liabilities on their account, I consented to and did, on the said 13th of July, reconvey and redeliver to said company all the property assigned by them, except four hundred dollars, the costs of the administration."

On cross-examination of the witness defendants offered to prove that legal and valid debts of Nixon & Co., amounting to one hundred and ninety-eight thousand dollars over and above the forty thousand dollars which had been presented to the trustee, duly sworn to according to law, and which existed at the time of the assignment of Nixon & Co., were presented to the trustee by the *bona fide* creditors of Nixon & Co. before the time had expired in which creditors had to present their claims, verified according to law, under an arrangement they had made with Nixon & Co. to have the assignment vacated and the property reconveyed to Nixon & Co., but did not propose to show that said one hundred and ninety-eight thousand dollars, or any part thereof, had been verified according to law, and admitted that they were not; whereupon the plaintiff objected to the admission of said testimony, which objection was sustained by the court; to which opinion of the court the defendants excepted.

Defendants also, on cross-examination of said witness, offered to prove that the assets of said Nixon & Co. in the hands of the assignee would not have paid over thirty cents on the dollar of the indebtedness of said company had the trustee gone on and executed the assignment and settled up the estate, and had the creditors presented their claims verified according to law; whereupon the plaintiff objected to the admission of said testimony, which objection was sustained by the court, to which ruling of the court the defendants excepted.

And thereupon the defendants offered to prove that the assets of Nixon & Co. in the hands of the assignee would not pay thirty cents on a dollar of the indebtedness of Nixon & Co., whereupon the plaintiff objected to the admission of said testimony, which objection was sustained by the court, to which ruling of the court the defendants excepted.

Lahn et al. v. Johnson.

Whereupon defendants asked the court to charge the jury that, in ascertaining the amount due the plaintiff, they must find the value of the assets assigned to Nixon & Co., and the amount of indebtedness of the company, and that the plaintiff will be entitled to recover only his *pro rata* share of assets, which the court refused to charge; but the court did charge the jury that in arriving at the amount of damages they should find the aggregate amount of the debts of Nixon & Co., that they had been presented and filed with the defendant Lahn as assignee, with an affidavit made and filed therewith setting forth that the said claim or claims were just and lawful, and showing what collateral or personal security, if any, claimants had or held for the same, or that he had no security whatever; then find the amount of assets in the hands of, or that came to the hands of, the defendant Lahn, as assignee of Nixon & Co.; then find the amount that defendant could have paid upon each of said claims presented as aforesaid; and that they should consider no claim, except it was filed and sworn to as stated, as entitled to participate in the distribution of said assets or fund; and that the amount, so found due on plaintiff's claim, would be the amount of his damages in this action, to which refusal and charge defendants excepted.

The jury returned a verdict in favor of the plaintiff for the full amount of his claim, upon which judgment was rendered. Thereupon defendants prosecuted their petition in error in the District Court to reverse the judgment, on the ground that the Common Pleas erred in its rulings in regard to the admission of testimony and in its charge to the jury. The case was reserved in the District Court for decision in the Supreme Court.

DAY, J.—The right of the plaintiff below to recover is not disputed. The controversy relates to the amount of the recovery. It is conceded that the assignee neglected and refused to account for any of the trust property as required by the condition of his bond. The statute provides that "any person injured by misconduct or neglect of duty of the assignee in regard to said trust may bring an action thereon, in his own

Lahn et al. v. Johnson.

name, against the assignee and his sureties, to recover the amount to which he may be entitled by reason of delinquency."

The question then is, how shall the amount be arrived at to which the plaintiff was entitled by reason of the delinquency of the assignee? The amount of the assignors' indebtedness greatly exceeded that of their assets; but the amount of the assets in the hands of the assignee exceeded that of all the claims which were presented to and allowed by him when he transferred all the trust property back to the assignors. This action of the assignee, it was true, was in compliance with the request of a large majority of the creditors, but so far as shown by the record, was not consented to by the plaintiff.

It is claimed in behalf of defendants below, that the plaintiff was entitled to recover so much only as he would have received if the trust property in the hands of the assignee had been distributed to all the creditors of the assignor in proportion to their respective claims. This position can be sustained only upon the assumption that an assignee is bound to distribute the assets *pro rata* among all the creditors, whether their claims are presented and allowed as required by the statute or not, and that the creditors whose claims are so presented and allowed acquire no rights superior to those who do not conform to the requirements of the law. This claim is untenable. In *Haskins v. Alcott* (13 Ohio St., 210) it was held that the "assignment devotes all the property covered by it to the creditors presenting their claims in pursuance of the statute," that the act in relation to assignments "regulates the administration of the assets assigned and points out the mode in which a participation therein may, and indeed must, be sought," and that "if a creditor does not acquiesce, his claim and his remedies thereon still remain, save that he cannot appropriate the assigned property to its payment, except in the manner and proportions therein prescribed." This is undoubtedly a correct exposition of the statute. The creditors, then, who proved their claims and had them allowed pursuant to the statute, and who did not release their right in the trust, were to the extent of their respective claims entitled to the

Churchill, Assignee, v. Whipple et al.

property assigned, to the exclusion of those who did not acquiesce in the assignment, and have their claims allowed under the law, and who had moreover relinquished whatever contingent right they might have had under the assignment.

The several rulings of the court below were substantially in accordance with this view of the case.

Judgment affirmed.

SUPREME COURT—WISCONSIN.

JANUARY TERM, 1877.

Under the statute of Wisconsin a voluntary assignment for the benefit of creditors is invalid, unless it be shown, by the affidavits of the sureties on the bond of the assignee, that they have property to the requisite amount *within the State*.

CHURCHILL, Assignee, v. WHIPPLE et al.

ACTION to recover the value of a stock of boots and shoes alleged to have been wrongfully taken by the defendants from the possession of the plaintiff, and unlawfully converted to their own use.

Cobban & Dunn, with a view to insolvency, executed to the plaintiff, as assignee, a voluntary assignment for the benefit of their creditors of all their property not exempt by law from seizure upon attachment or execution. By virtue of such assignment the plaintiff took possession of the assigned property, including the goods in controversy. The assignment was executed, and a copy thereof filed in the proper office, in attempted compliance with the statute. (Laws of 1858, Chap. 64, Sec. 1; R. S., 411; Tay. Stats., 843.) The defendant Richardson, who was then the under-sheriff of the county where the goods were, seized the goods by virtue of a writ of attachment duly issued at the suit of a creditor of Cobban & Dunn, in an action by such creditor against that firm. This is the taking complained of. The defendant Whipple was then the sheriff

Churchill, Assignee, v. Whipple et al.

of such county. A bond in the form prescribed by the statute, with two sureties, was also executed and filed in the proper office. Each of the sureties made an affidavit that "he is a freeholder and resident of the city Eau Claire, in the State of Wisconsin, and is worth the sum of two thousand five hundred dollars over and above all his liabilities, in property not exempt by law." No affidavit of the sureties that their property was within this State was presented to the Court Commissioner, who is named in the bond as obligee. The commissioner indorsed upon the bond his approval thereof, both as to form and sufficiency of sureties. Upon the foregoing facts, which are not disputed, the Court directed the jury to find for the defendants, and the plaintiff appealed from a judgment for the defendants entered pursuant to the verdict.

Henry H. Hayden, for the appellant, contended: 1. That the assignment was not void for failing to state on its face that the assignee was a resident of this State, the statute not requiring that fact to appear in that manner. 2. That it was not void because the affidavits of the sureties do not show on their face that their property, to the amount required, is in this State; that the essential thing of which the statute speaks is, that the officer who takes the bond shall be satisfied of that fact; that such officer acts judicially in determining the sufficiency of the bond, and has exclusive authority and jurisdiction to determine that question; and such sufficiency, when so determined, includes the proper location of the property. (*Hutchinson v. Brown*, 33 Wis., 465.)

L. M. Vilas, for the respondent, held that no voluntary assignment for the benefit of creditors, not made in strict compliance with the statute in that behalf, can be held valid as against creditors. (*Hardman v. Bowen*, 39 N. Y., 196; *Juliand v. Rathbone*, id., 369; *Britton v. Lorens*, 45 id., 51; *Williams v. Ins. Co.*, 9 How. Pr., 365; *Stewart v. McMinn*, 5 W. & S., 100; *McGlone v. Prosser*, 21 Wis., 273; *Page v. Smith*, 24 id., 368; *Sedgw. Stat. and Con. Law* (2d ed.), 93); that as the

Churchill, Assignee, v. Whipple et al.

statute requires the assignee's bond to be executed and delivered to a county judge or court commissioner who is not a creditor of the assignor, the fact so required should appear from the bond itself (by the assignor's or commissioner's certificate annexed to the bond and assignment), or at least should have been shown at the trial of this action by some other competent proof; and that the assignment here was invalid under Chap. 64, Laws of 1858, because the officer did not certify that he was satisfied by the affidavits of the sureties that their property within this State was worth the amount specified in the bond, and because, in fact, the affidavits did not show such to be the case. (*Hutchinson v. Brown*, 33 Wis., 465.)

LYON, J.—The statute which must control the determination of this appeal (Laws of 1858, Chap. 64, Sec. 1) is as follows:

"All voluntary assignments or transfers whatever, of any real estate, chattels real, goods or chattels, rights, credits, moneys, or effects, hereafter made within this State, for the benefit of creditors, or with a view to insolvency, shall be void as against the creditors of the person making the same, unless the assignee or assignees shall be residents of this State, and shall, before taking possession of the property assigned, and before taking upon himself, or themselves, the several trusts conferred upon him or them by the instrument of assignment conveying and assigning such property or appointing such assignee, execute and deliver to the county judge or court commissioner of the county in which such assignor, or some one of the assignors, at the time of the execution of such instrument of assignment shall reside, not being a creditor of such assignor, a bond in such sum, not less than the whole amount of the nominal value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses, and of the assignor, with two more sufficient sureties, freeholders of this State, who shall each testify as to his responsibility, and by several affidavits satisfy the officer taking such bond that the property of such sureties (being within this State) is worth in the aggregate the sum specified therein." The balance of the section prescribes

Churchill, Assignee, v. Whipple et al.

the condition of the bond. The case turns upon the question of the validity of the assignment as against creditors of the assignors. If this is valid the judgment is wrong and must be reversed; if invalid as to such creditors, the judgment should be affirmed. It is not denied that if, in the execution of the assignment, there was a failure to comply with any requirement of the above statute, the assignment is void. There was no affidavit of the sureties presented to the court commissioner taking the bond that they had property in this State worth in the aggregate the sum specified in the bond. If, therefore, the statute requires that fact be shown by the several affidavits of the sureties, the assignment is void, and the judgment should not be disturbed.

Notwithstanding the very ingenious argument of the learned counsel for the plaintiff in support of the opposite view, it seems very clear to our minds that the statute requires such fact to be shown by affidavits of the sureties, and that in no other way can it be made to appear that they have the requisite property in this State. The plain meaning of the statute is, that the assignment shall be void unless the sureties shall satisfy the officer taking the bond that they have the requisite amount of property in this State, and that this can only be done by the affidavits of the sureties themselves. Without such affidavits the officer cannot be satisfied of the fact so as to give validity to the assignment. To hold otherwise would, it seems to us, be doing violence to the plain language of the statute, as well as to the manifest intention of the Legislature. The statute was enacted for the protection of the creditors of persons in failing circumstances who might see fit to make a voluntary assignment of their property for the benefit of their creditors. Its principal object and purpose is to secure the proper appropriation of the debtor's property towards the payment of his debts. Hence, the Legislature carefully provided that the assignee who takes the property and its proceeds shall give ample security for the performance of his trust, and to that end special precautions were prescribed to prevent the acceptance of irresponsible sureties. The affidavits of the sureties furnish the

Bell v. Lamprey.

best evidence of the location of their property, if not of its value, and, if willfully false, perjury may be assigned upon them. Such affidavits are valuable guaranties to the creditor of the sufficiency of the sureties, and it accords with the policy and purpose of the statute to require them to be made as conditions precedent to the validity of the assignment. In view of these considerations, we should be strongly inclined to construe the statute in the same way, even though its language was doubtful or ambiguous on the subject. For, in so far as the statute seeks to enforce the proper application of the trust funds in the hands of the assignee, it is remedial, and should be liberally construed. The foregoing views are not in conflict with the decision of this court in *Hutchinson v. Brown* (33 Wis., 465), although the learned counsel for the plaintiff relied greatly upon that case to sustain this assignment. There the assignment was attacked because the affidavits failed to state that the property of the sureties was not exempt from seizure on execution, but the assignment was upheld on the express ground that the statute does not require that fact to appear in such affidavits, and hence, that a proper justification in that respect should be presumed.

Judgment affirmed.

SUPERIOR COURT OF JUDICATURE—NEW HAMPSHIRE.

AUGUST 10, 1876.

Under the General Statutes of Massachusetts, a discharge in insolvency is a bar only as to debts contracted by the debtor within the State, and while an inhabitant of the State.

BELL v. LAMPREY.

ASSUMPSIT on a promissory note, of which the following is a copy :

“HAVERHILL, July 7, 1857.

“Two months after date, I promise to pay to the order of Joseph Fitts eleven hundred dollars. Value received.

“Indorsed, J. F.

“J. S. L.
E. P.”

Bell v. Lamprey.

It was admitted that the plaintiff of record had no interest in the note, which had been indorsed to enable him to commence the suit in his own name, and that Joseph Fitts had been all the time a citizen of Massachusetts.

The defense was, 1st, the statute of limitations; 2d, a discharge under the Insolvent Law of Massachusetts. The facts in regard to the statute of limitations were, that the defendant was not openly and notoriously in the State of New Hampshire for the space of six years, during the time between the maturity of the note and the date of the writ; also, that, reckoning by the number of secular days in the year, he was so present more than six years during the same time; also, that, reckoning by the number of business hours in a day, he was so present in the State more than six years.

In regard to the discharge in insolvency, it appeared that, at the time of making the note, which was made in Massachusetts, the defendant was a citizen of New Hampshire; that, at the time of the commencement of the proceedings in insolvency, and until his discharge, he was a citizen of Massachusetts; that the plaintiff had other notes against the defendant, which were proved in insolvency, but that the note in suit was not so proved. There being no assets, the defendant could not have his discharge without the written assent of a certain portion of his creditors. The plaintiff signed such assent. The assent was in the following terms: "The subscribers, creditors of the said insolvent debtor, whose claims have been proved and allowed against his estate, hereby signify their assent to his receiving his certificate of discharge." The certificate of discharge purported to discharge the defendant from all his debts, which have or shall be proved against his estate, and which are founded on any contract made by him within the State, or to be performed within the same, made since the last day of July, 1838, and from all debts which are provable, as aforesaid, and which are founded on any contract made by him since that date, and due to any persons who are resident within the Commonwealth, being the day of the first publication of notice of the warrant for the seizure of the defendant's

Bell v. Lamprey.

estate. This certificate was substantially the same as that provided by the original Insolvent Law of Massachusetts, passed in 1838, and corresponded substantially with that part of the Law of 1838 quoted below, which defined and determined the effect of the discharge. That law originally contained this clause: "The debtor shall be thereupon wholly and absolutely discharged from all his debts, which shall at any time be actually proved against his estate, assigned as aforesaid, and from all debts which are provable under this act, and which are founded on any contract made by him after this act shall go into operation, if made within the Commonwealth, or to be performed within the same; and from all debts which are provable as aforesaid, and which are founded on any contract made by him after this act shall go into operation, and due to any person who shall be resident within the Commonwealth at the time of the first publication," etc.

By Statute 1855, Chap. 363, it was provided that "No person shall hereafter take the benefit of the Insolvent Laws who was not, at the time the debts from which he seeks to be discharged were contracted, an inhabitant of the State, and who is not also, at the time of instituting the proceedings for the purpose of taking the benefit of said acts, an inhabitant of this State."

No change was made by this statute in the form of the certificate, or in that part of the Statute of 1838 which declared the effect of a discharge, so that any person who could bring himself within this statute so as to take the benefit of the Insolvent Laws would, if discharged, be as fully discharged as before that statute.

By the General Statutes, enacted in 1859, Chapter 118, Sec. 17, it was provided that "Any inhabitant of this State, owing debts contracted *while such inhabitant*," etc., "might apply," etc.

By the same act, Sec. 76, it was provided that the debtor should be discharged "from all debts provable under this chapter, and founded on any contract made by him subsequently to the last day of July, 1838, and while an inhabitant of this State, if made within this State, to be performed within the

Bell v. Lamprey.

same, or due to any person resident therein at the time of the first publication of the notice of the issuing of the warrant."

The form of the certificate of discharge was not substantially altered.

The defendant's proceedings in insolvency were commenced and completed under General Statutes of Massachusetts, Ch. 118; and the question which arose was as to the effect of his discharge under this statute. The case was transferred by Rand, J., with the provision that for certain specified purposes, at the election of either party, the case should be discharged and the action stand for trial, otherwise judgment should be ordered in accordance with the finding of the court on the statement of facts contained in the printed case.

Marston, Small & Wiggin, for the defendant.

Hatch and Charles U. Bell, for the plaintiff.

CUSHING, J.—This case has been argued at great length and with great ability by the counsel on each side. In the view taken of the case, the points taken by counsel will become apparent.

Under the decision in this case, reported in 52 N. H., 41, on the Statute of Limitations, the only question which arises is as to the computation of time.

The defendant contends that, as no service could be made on Sunday, the Sundays should not be taken into consideration in ascertaining the number of years during which he had been present in the State openly and notoriously, so that the year would consist of three hundred and thirteen days instead of three hundred and sixty-five, or of hours enough to make three hundred and sixty-five days of ten hours each.

In the case of *Bennett v. Cook* (43 N. Y., 537, 3 Am. R., 727), this very point was substantially decided. In that case the defendant, being resident in New Jersey, had for seven years done business in the city of New York for about the same length of time each day, and, except a very few days when absent from sickness or unavoidably detained, for upwards of

Bell v. Lamprey.

seven years. He went to New York City openly and publicly, had his office there with his name thereon, and had no other place of business. During all that time, however, he resided in Jersey City. Reckoning ten hours to the day, and omitting the Sundays, he would have made out the six years' presence in New York; but it was held that the statute had not barred the claim. The principle of that decision, if I can understand it, is that the time necessary to bar the claim must be six whole years of three hundred and sixty-five days in common years, and three hundred and sixty-six in leap years. I think the same principle determines this case, and that the action was not barred by the statute of limitations. It seems sufficiently clear also that, according to provisions of the Massachusetts Insolvent Law in force at the time of the defendant's proceedings in bankruptcy, the certificate did not bar this debt, because, although it might come within the terms of the certificate, it does not come within the terms of the statute limiting and determining the effect of the discharge.

This section in the statute succeeds that in which the form of the certificate is enacted, and I think must be construed to control and limit the certificate.

Against this view is cited the case of *Breed v. Lyman* (4 Allen, 170). This case was decided after the passage of Gen. Stats., Chap. 118; but, as I understand the case, on facts arising before, and the effect of which was determined under the statutes in existence at the time.

As I understand that case, it was objected that no person under the Statute of 1855 could take the benefit of the Insolvent Laws, who was not, at the time *all* the debts from which he sought to be discharged were contracted, an inhabitant of the State. It was held by the court that it was sufficient if *some* of the debts were so contracted. The defendant having thus brought himself within the category of those who might apply, the effect of his discharge was governed by the law as it was when he commenced his proceedings, and the debt in suit was held to be barred.

The court fortified its construction by referring to Sec. 16,

Bell v. Lamprey.

Chap. 118, Gen. Stats., which determined who might apply for the benefit of the law, but did not in any way allude to the effect of Section 76 upon the discharge. The case of *Breed v. Lyman*, therefore, cannot be cited as an authority on the effect of the discharge, under General Statutes, Chap. 118.

The debt in suit was not a contract made while the defendant was an inhabitant of the State of Massachusetts, and is not embraced in Section 76 of the General Statutes of Massachusetts, Chap. 118, and is not barred by the discharge. It is also said for the defendant that the plaintiff assented to his discharge; but I cannot understand that the assent goes any further than the discharge.

By its terms I do not understand that the subscribers recite that all their claims have been proved, but that they have some claims which have been proved and allowed; and the assent must, I think, be understood to be limited to the legal effect of the discharge.

It is also said that the plaintiff, by proving some claims, has come in voluntarily to take the benefit of the act, and therefore waived his right to object to the discharge of the claims not proved. I do not think that a party resident within the State, and subject to its process, can be said to come in voluntarily. If he lived without the jurisdiction, where the process of the court could not run, it might with truth be said that, if he came in, he came in voluntarily; and in such case he might well be held to have waived his objection.

It is also said that it would operate as a fraud upon the other creditors to permit the plaintiff, after assenting to the discharge, to hold back a part of his claim, because it would lead them to suppose that he had assented to a complete discharge when he had not; and that class of cases is cited where it is held that creditors, parties to a compromise with a debtor, cannot lawfully stipulate for advantages over other creditors.

I think, however, those cases do not apply, because I think that all the creditors must be taken to have understood and signed the assent in its legal acceptance.

The defendant's counsel, at the end of their last brief, sug-

Forkner, Assignee, v. Shafer et al.

gest that the discharge in *Breed v. Lyman* was granted July 16, 1860, after the general statutes alluded to went into operation. I think, however, that the case of *Breed v. Lyman* assumes that the effect of the discharge must depend upon the law in force at the time the proceedings in insolvency were commenced.

I have, therefore, not undertaken to investigate that question, though it certainly seems to me, on general principles, difficult so to construe these statutes as to make the insolvent's discharge less effective when it was granted than it would have been by law as existing at the time of his application.

It is also objected by the plaintiff that, according to the defendant's construction of the statute, it would be not in accordance with the Constitution of the United States.

That construction not having been adopted, the question of constitutionality does not arise.

There should be judgment on the report of the referee for the plaintiff, unless the defendant elects a trial.

LADD and SMITH, JJ., concurred.

SUPREME COURT—INDIANA.

MAY TERM, 1877.

Under the statute of Indiana "providing for voluntary assignments" (1 R. S., 1876, p. 142), the title to the property assigned does not pass to the assignee until the assignment is duly recorded.

The assignee cannot replevy personal property from an officer who holds the same by virtue of an execution levied prior to the recording of the assignment.

FORKNER, Assignee, v. SHAFER et al.

W. A. Bickle and S. A. Forkner, for appellant.

J. Yaryan, J. L. Yaryan, B. Harrison, C. C. Hines and W. H. H. Miller, for appellees.

PERKINS, J.—Action to recover possession of personal property, commenced on the 22d day of September, 1873.

Forkner, Assignee, v. Shafer et al.

Answer in two paragraphs: First, the general denial; and second, that on the 2d day of August, 1873, two of the defendants, Pauly and Caldwell, recovered a judgment before the Mayor of Richmond, Wayne County, Indiana, against Minnie Wedekind, for, etc.; that, on the same day, an execution was duly issued thereon, and levied upon the goods sought to be recovered in this action, as the property of said Wedekind, by Shafer, the Marshal of Richmond, and the co-defendant, in this suit, of Pauly and Caldwell.

The plaintiff replied to this paragraph of answer, that said Wedekind, on the 1st day of August, 1873, made an assignment, under the Act of 1859 (1 R. S., 1876, p. 142), accompanied by a schedule, etc., of all her property, to the plaintiff, as assignee, for the benefit of all her creditors, which assignment was filed on the said 1st day of August, 1873, in the clerk's office of the Circuit Court of Wayne County, Indiana; that possession of the property was taken by the assignee, of which defendants had notice, and that on the 5th day of August, 1873, the assignment was filed in the recorder's office of said county, and recorded.

The deed of assignment and schedule were made exhibits.

A demurrer was sustained to this reply, and exception taken.

A reply in denial of the second paragraph of answer was then filed. Trial; judgment for defendants. The evidence is not in the record. The only question presented is, upon the sustaining of the demurrer to the reply. We think the ruling on the demurrer was correct. The statute under which the assignment was made (*supra*), Section 2, declares that all assignments under this act "shall, within ten days after the execution thereof, be filed with the recorder of the county in which the assignor resides, whose duty it shall be to record the same," etc., and that "no assignment under this act shall convey to the assignee any interest in the property so assigned until such assignment is recorded as provided for in this section."

The assignment in this case was not recorded till the 5th of August, 1873, three days after the property had been legally

In re Holt.

taken by the defendants on execution. Till such filing, the plaintiff, Forkner, acquired no title, and title subsequently acquired would not divest a prior legally acquired lien.

It was within the power of the Legislature to fix the time when, and the conditions upon which, property assigned under the act in question should vest in the assignee.

The Legislature has regulated these matters in no ambiguous language. There is no room for construction. The title acquired by the plaintiff on the 5th day of August was subject to the prior lien and right of possession of the defendants, and he could not, therefore, recover in this suit.

Judgment affirmed with costs.

SUPREME COURT—IOWA.

DECEMBER TERM, 1876.

Under the statute of Iowa, creditors who fail to file their claims with the assignee within three months after the first publication of the notice of assignment are not entitled to share *pro rata* in the first dividends.

Matter of the assignment of HOLT.

THE notice of assignment was published first the 28th day of January, 1876. Notice was mailed to each creditor the 29th day of January, 1876. J. G. Abell filed a claim May 22d, 1876, and moved for an order that he be paid a *pro rata* share. Other creditors who had filed claims within three months from the date of first publication resisted said Abell's motion on the ground that his claim was filed more than three months after the date of first publication. The District Court sustained the motion. The other creditors appeal.

Clark & Haddock, Baker & Ball, Finch & Matthews, for appls.

Edmonds & Younkin, for appellees.

ADAMS, J.—By Section 2120 of the Code it is made the duty of the assignee, at the expiration of three months from

In re Holt.

the time of first publishing notice, to report and file with the clerk of the court a list, under oath, of all such creditors of the assignor as shall have claimed to be such, with a statement of their claims. By Section 2121 it is provided that any person interested may appear within three months after filing such report, and file with the clerk exceptions to the claim of any creditor. There is no provision requiring the assignee to make any other report within any specified time. On the other hand, it is provided by Section 2122 that, if no exceptions are filed, the court shall order the assignee to make, from time to time, fair and equal dividends among the creditors, in proportion to their claims. It is evident that this may be done before the expiration of three months from the last publication, if publication be continued long enough, and we see no reason why the assets may not be exhausted before that time. It may be claimed that, conceding this to be so, the claimant who files his claim between the expiration of three months from the first publication and the expiration of three months from the last publication should share *pro rata* in such assets as are not exhausted. The answer to that is, that any one interested has three months to file exceptions to such claim after it has been reported by the assignee, and there is no provision as to when such report should be made. Those who file within three months from the first publication file in time to enable their claims to be embraced in the assignee's report, which must be made within a required time. Why should payment to them be delayed to enable others to share *pro rata* whose claims are not filed soon enough to be reported? Why, indeed, should a report be required before the claims are all in which are entitled to share *pro rata* in the first dividends? If Section 2126 stood alone we should be inclined to think that claims filed within three months from completed publication should participate in the first dividends; but we cannot put this construction upon that section consistently with the other sections to which we have referred. We think the District Court erred in sustaining the claimant's motion.

Reversed.

Holland et al. v. Drake et al.

SUPREME COURT—OHIO.

DECEMBER TERM, 1876.

One member of an insolvent firm cannot, either before or after dissolution of the partnership, make a valid assignment of all its effects for the benefit of creditors against the will of a copartner, or without procuring his assent when present and accessible.

If such other partner subsequently ratifies the assignment, the ratification relates back and takes effect from the time of executing the assignment; but not so as to defeat the rights of third persons *bona fide* acquired in the meantime.

*JOHN HOLLAND and WILLIAM B. PETTIT, v.
J. M. DRAKE et al.*

TRACY and McKay were partners in the "grain and feed business," in the city of Cleveland, Tracy being the active and managing member. On the 13th of December, 1867, the firm then being insolvent, McKay caused a notice of the dissolution of the partnership to be published in the city papers; and afterwards, on the 20th of the same month, he executed to J. M. Drake, and filed in the Probate Court, a general assignment of the property and effects of the company, for the benefit of all its creditors. On the last-named day, but subsequently to the execution and filing of the assignment, Holland and Pettitt caused part of the property so assigned to be seized upon an attachment issued in an action which they had lately brought against the firm, and in which they afterwards recovered judgment. Prior to the execution of the assignment Drake had consented to act as such assignee, but the assignment was not in fact delivered to him, or he made aware of its existence, until some days after the levy of the attachment; but, when notified thereof, he accepted the same, and qualified as such trustee. At the time McKay executed the assignment, his copartner, Tracy, was in the city, but was not consulted, and when informed by McKay of its execution, refused to assent, and he did not assent until some time after the levy of the attachment. By mutual agreement between the parties inter-

Holland et al. v. Drake et al.

ested, Holland and Pettitt, Drake and McKay, the attached property was then delivered by the sheriff to Drake, as assignee, "to be sold by him instead of the sheriff," and the proceeds to "stand in place of the property, and be applied in payment of Pettitt and Holland's judgment, in case the court should hold the attachment a good lien."

* The assignee sold the property in pursuance of this agreement, and brought the money into the Probate Court, and Holland and Pettitt filed their petition therein against Drake, McKay and Tracy, asking to have the money adjudged and paid to them, in preference of the other creditors.

On hearing of this petition it was dismissed, the Probate Court holding that the assignment had precedence of the attachment, and that the fund should be distributed *pro rata* among all the creditors. On proceedings in error this judgment was affirmed in the Common Pleas, and Holland and Pettitt, having filed a petition in error in the District Court to reverse the judgment of affirmance, the case was reserved for decision here.

Estep & Burke, for plaintiff in error.

The important question in this case is, whether one partner, against the refusal of his copartner to join therein, can make a valid assignment of the partnership assets to a trustee of his own selection.

We maintain he cannot, and refer to the following authorities: Burrill on Assignments, 43-65 inclusive; *Harrison v. Sterry* (5 Cr., 289); *Pearpoint v. Graham* (4 Wash. C. C., 232); *Deckert v. Filbert* (3 W. & S., 454); *Kirby v. Ingersoll*. (Har. Ch., 172); *Hughes v. Ellison* (5 Mo., 468); *Drake v. Rogers* (6 Mo., 317); *Dana v. Lull* (17 Vt., 390); *Deming v. Colt* (3 Sandf., 284; 2 ib., 292); *Hayes v. Heyer* (3 ib., 284); *Kemp v. Carnley* (3 Duer, 1); *Fisher v. Murray* (1 E. D. Smith, 341).

Elwell & Marvin, for Drake.

The only objection that can be raised to said assignment is

Holland et al. v. Drake et al.

that it is a fraud on the rights of the partners, inasmuch as it destroys the partnership.

If this is a wrong, it certainly does not injure the creditors, and neither of the partners make any complaint.

The partner who was not consulted is the only person who has a right to complain. No one else can, for he alone was injured.

The court will sustain an assignment made by one partner for the benefit of all the creditors. (Burrill on Assignments, 42-44, 51.)

No one but an absent partner can question the validity of an assignment executed by his copartner. It is not void "*per se*," but only voidable at the election of the absent partner. (4 Washington C. C., 232; *Sheldon v. Smith*, 28 Barb., 593; 4 N. Y. Digest, 191, 311). As to a subsequent ratification, see 5 Hill., 107; Story on Assign., Secs. 239-244.

Admitting that one partner cannot in law make such an assignment, yet he might, in view of the fact that the firm was insolvent, file his bill in equity, asking that the firm property might be sold for the benefit of all the creditors. And if he has done what a court of equity would have done, then the court will sustain the act.

Prentiss, Baldwin & Ford, for defendants in error.

1. This case, so far as the power of one partner, McKay, is concerned, to make a general assignment of all the personal property of a firm consisting of two partners, does not raise the abstract question of such a power in Ohio under our law forbidding preferences, and making a ratable and equal distribution; but if it did, there is very much to be said in favor of such a power. But this case stands upon the following circumstances, differing it from the mere abstract question:

1. The firm was insolvent. 2. An attachment had been got out, of course, for fraud, and that of Tracy, the partner who, it is claimed, did not join in the assignment. 3. Tracy was applied to to join, and assented, but then expressed a wish to see his

Holland et al. v. Drake et al.

counsel about it, and after doing so declined, and subsequently deliberately assented again. He never objected to it, and his subsequent express ratification of it made it good from the beginning. 4. Was it a lien or incumbrance plaintiffs in error had, after the sheriff gave up the property? The attachment was gone; if plaintiff had anything, it was an equity, so that a Court of Chancery could have enforced their remedy, and that court only, and the Probate Court could not—the expression lien or incumbrance referring to some plain *legal* right.

It seems plaintiffs are unwilling to recognize the assignee as such, under this assignment, and place the attached property in his hands, giving up the attachment; but they say they have an agreement from him that he will not do his duty, and administer the assignment as the law requires him to do, but do so for their exclusive benefit. No court of equity would admit this as a good title for relief. Again, when the motion to dissolve the second attachment was declared for plaintiffs, they had no subsisting attachment, for it was already dissolved by their own act of giving up the property, and the refusal of the court to dissolve it, on the ground that Tracy was guilty of no fraud, would not give vitality to it.

And now plaintiffs call on the Probate Court to require the assignee to violate his duty as such—go on and sell the attached property after the sheriff has surrendered it, and account to them for the whole of it, because he has promised to do so. Why did not they have the sheriff hold on to it if they had a good title? Why did they seek to entrap the assignee into an agreement contrary to his duty, and use him as their mere instrument? The contract and promise were void, against public policy, and against the spirit of the statute, and against the rights of the rest of the creditors. And there was no lien or incumbrance, and no remedy, unless to go into a court of equity and move there. *Hyde v. Olds* (12 Ohio St., 591); *Story on Part.*, 322, 327, 328; *Hitchcock v. St. John* (1 Hoffm., 511; 1 Hardy, 87); *Burrill on Assign.*, 51, 306, 340; *Sheldon v. Smith* (28 Barb., 593); *Robinson v. Gregory* (29 Barb., 560).

Holland et al. v. Drake et al.

WELCH, J.—The important question in the case is, whether one member of an insolvent firm, either before or after dissolution of the partnership, can make a valid assignment of all its effects for the benefit of creditors against the will of a copartner, or without procuring his assent when present or accessible.

Until this question is decided in the negative, it is unnecessary to consider the questions whether this firm was dissolved by the published notice, and if so, whether such dissolution had the effect to lessen or take away the power to assign. The important question is, did the power ever exist.

The authorities and decisions on this subject are quite numerous, and are far from being uniform. It is deemed unnecessary here to attempt a review of them, or to enter into or repeat the reasoning, *pro* and *con*, on which they assume to stand. The leading cases will be found enumerated and referred to in Parsons on Partnership, 165 (notes l, m, n, o), and Story on Partnership, Section 101, note 2. We have examined these cases with much care and consideration, and think the weight of authority, as well as the better reasoning, is with those who deny the validity of such an assignment. The power to make it is not within the contemplation of an ordinary partnership contract. It is not a power to act as *agent* of the company in carrying on its business and paying its debts, but a power to *appoint* an agent and to clothe him with all the powers of the partners. If the power exists where there are only two partners, as in the present case, it must also be conceded where there are many. It is easy to see that in many such cases it might be exercised to the great injury and annoyance of the non-consenting members of the firm. It is often the case, especially in times of financial depression, that a firm, if forced into liquidation, and their effects sold under the hammer, would prove insolvent, whereas if suffered to struggle on they would become solvent and successful. In such cases a single member, without the concurrence of the creditors, could, by the exercise of the power in question, bring it to an end, and place all its interests in the hands of a trustee of his own

Holland et al. v. Drake et al.

selecting; or, by threatening to exercise the power, he could compel his co-partners to submit to unjust terms of forbearance. True, he might, in the absence of such a power, where the terms of the partnership did not forbid it, by a proceeding in equity, dissolve the firm and place its assets in the hands of a receiver.

But in that case the receiver would be chosen and appointed by the court, and not by the partner, and the other members of the firm would be consulted and heard. We think the safer and juster rule is to require the assent of all the partners, either actually given or to be fairly implied from the situation of the parties, or from the manner of conducting the business of the firm.

But it is claimed that the assignment took effect from the date of its execution by McKay, because its subsequent approval by Tracy related back and took effect from the date of its execution, which was prior to the attachment. As between the partners, and as between them and third persons who acquired no new rights in the meantime, this is undoubtedly true. Such is the well-settled law in all cases of volunteer agencies. It is equally well-settled, however, that it cannot have effect so as to defeat the rights of third persons *bona fide* acquired in the meantime. A contrary rule of law would be calculated to work manifest injustice. Take the present case for an example. Holland and Pettitt levied their attachment while the assignment remained in abeyance. It might never be confirmed by Tracy. With him alone rested the power to give it effect or to defeat it. If Holland and Pettitt dismissed their attachment, Tracy might fail to affirm the assignment, and they would lose their lien if they persisted in their attachment proceedings. Tracy might affirm the assignment and they would be left to pay their costs. They would thus be placed completely within Tracy's power, and their rights be made to depend on his will or caprice. Such is not the law. The assignment took effect from the date of its execution, but not so as to affect the rights acquired by the intervening attachment. The question, therefore, whether the assignment is to be re-

Bennett, Assignee, v. Ellison.

garded as taking effect from the time when it was delivered to the Probate Court, or from the time of its actual acceptance by the assignee, becomes immaterial. It is enough that the attachment was levied before the confirmation by Tracy.

It is also claimed that the lien of the attachment was lost by the agreement under which the property was delivered to the assignee by the sheriff. We are of opinion that the parties are estopped by their agreement from setting up any such defense. The property was given into the hands of the assignee on the faith of the agreement.

But for the agreement it would have been retained and sold by the sheriff. To allow this defense would be to aid the defendants in practicing a fraud upon the plaintiffs.

A further claim made by the defendants in error is that the proper parties were not before the court; that the creditors of the firm, as well as the assignee, should have been made parties defendant. We think otherwise. The assignee, like an executor or administrator, is an officer recognized by the law, and whose duties and qualifications are regulated by law, and he fully represents the creditors in such cases.

The judgment of the Common Pleas and Probate Courts must be reversed, and the cause remanded to the Probate Court for further proceedings.

SUPREME COURT—MINNESOTA.

DECEMBER 15, 1876.

A general assignment, executed with the intent and for the purpose of thereby effecting a compromise with the creditors of the assignor, is void. It is not necessary, in order to enable the creditors to avoid the assignment, that the assignee should have had knowledge of the assignor's fraudulent intent.

ELIHU M. BENNETT, Assignee, v. JAMES A. ELLISON.

THE plaintiff, as assignee of one James P. McClelland, for the benefit of creditors, brought this action to recover the value

Bennett, Assignee, v. Ellison.

of a large amount of personal property, taken from the plaintiff's possession and sold by the defendant, as sheriff, by virtue of certain executions against the property of McClelland. In his answer the defendant assailed the assignment as made with intent to hinder, delay, and defraud the assignor's creditors. At the trial, in the District Court for Olmsted County, before Mitchell, J., the defendant introduced evidence tending to prove that, shortly before the assignment, McClelland being insolvent, and largely indebted to various persons—among others, to the firm of E. M. & D. C. Bennett, of which the plaintiff was a member—arranged with the plaintiff that he, McClelland, should, if possible, effect a compromise with all his creditors, upon the basis of fifty cents on the dollar, cash in hand, except the debt due E. M. & D. C. Bennett; that, if the compromise was effected, the plaintiff should furnish McClelland the money necessary to carry it out, which advances, together with the debt due E. M. & D. C. Bennett, were to be paid in full by McClelland; that, pursuant to the arrangement, McClelland attempted, through an agent, to effect the compromise; that a majority of his creditors agreed to accept it, but others refused; and that, on learning that the acceptance of the compromise had not been obtained, he made to plaintiff the assignment in question. The defendant also introduced evidence tending to prove that McClelland made the assignment with intent thereby to bring about a consummation of the proposed compromise, and with the expectation and intent that the execution of the assignment would and should induce and influence his creditors to accept the proposed compromise, and take fifty cents on the dollar in full satisfaction of their claims. The defendant also introduced evidence tending to prove that plaintiff knew all these facts at and prior to his acceptance of the assignment. The plaintiff introduced evidence tending to rebut that of defendant. In the schedule, forming part of the assignment, McClelland's assets were stated at thirteen thousand six hundred and seventy-five dollars, and his liabilities at nineteen thousand nine hundred and eighty-two dollars and forty cents, the debt to E. M. & D. C. Bennett being eight thousand

Bennett, Assignee, v. Ellison.

dollars, and the remainder being divided among nineteen different creditors.

The plaintiff requested the court to give the jury the following instructions, each of which was refused, and due exception taken: 1. An assignment of property which will not actually have the effect of unlawfully hindering, or delaying, or of defrauding the creditors of him who makes the assignment is a lawful and valid transaction against such creditors; and the intention of the person who makes such assignment, in making the same, is wholly immaterial. 2. An assignment made by an insolvent debtor, of all his property, for the equal and ratable benefit of all his creditors, will not operate to unlawfully hinder, or delay, or to defraud any such creditor, unless there be an unreasonable delay in converting the property into money and dividing the same among the creditors, or unless some part of the assigned property be diverted to the use of the debtor, or to some other use which will prevent it being converted into money within a reasonable time, and divided among the creditors. 3. An assignment by an insolvent debtor, of all his property, for the equal and ratable benefit of all his creditors, will be valid, unless made with the intent that there shall be an unreasonable delay on the part of the assignee in converting the assigned property into money and dividing the same among the creditors, or unless made with the intent that some part of the assigned property shall be diverted to the use of the debtor, or to some other use which will prevent it being converted into money, without unreasonable delay, and divided among the creditors. 4. An assignment made by an insolvent debtor, of all his property, for the equal and ratable benefit of all his creditors, is not invalid because made with the belief, on the part of the debtor and assignee, that it will influence the creditors to compromise with the debtor, and release him from their debts, unless it be further intended to make the right of creditors to share in the estate to depend upon their acceptance of the compromise and their release of the debtor. 5. The assignment in this case is valid, unless, when it was executed, it was intended, on the part of McClelland, at least,

Bennett, Assignee, v. Ellison.

that, in case no compromise with the creditors should result, there should be unreasonable delay in converting the property into money, and in dividing the same among the creditors; or that a part of the property should be diverted to the use of McClelland, or to some other use which should prevent it being converted into money without unreasonable delay, and divided among the creditors. 6. If, when the assignment in question in this case was executed, McClelland and Bennett both believed that the creditors would be materially, or even strongly, or even effectually, influenced thereby, to compromise with McClelland and release him from his debts, that fact did not affect the validity of the assignment. 7. If the jury believed that the assignment was executed by McClelland, with the intention and for the purpose sworn by him upon the trial—that is to say, for the purpose of influencing his creditors to compromise with him—they must find for the plaintiff. 8. If an assignment by an insolvent debtor of all his property, for the benefit, equally and ratably, of all his creditors, should be made with the intent to hinder, delay, or defraud his creditors, that fact would not render the assignment invalid, unless the assignee, when he took the assignment, should have notice of such intent on the part of the assignee.

The plaintiff's counsel also requested the court to instruct the jury that the mere fact that, when the assignment was made, McClelland and Bennett believed that it would influence the creditors of McClelland to compromise with him would not render the assignment fraudulent; which instruction the court refused, and instructed the jury as follows, the plaintiff excepting: "The mere fact that McClelland and Bennett, or McClelland alone, still entertained the hope or expectation that the proposed compromise would be consummated, notwithstanding the making the assignment, would not render the assignment void, provided McClelland's intent in making the assignment was not thereby to induce, influence, and coerce his creditors to accept the proposed compromise; but, as I have said before, if McClelland's intent in making the assignment

Bennett, Assignee, v. Ellison.

was that it should operate to induce or coerce creditors to accept the proposed compromise, it would be void." The following instructions were given at defendant's request, the plaintiff duly excepting: "1. As to the assignment under which the plaintiff claims in this case, there is but a single question for you to pass upon, viz.: What was McClelland's intent and purpose in making it? The intent with which Bennett received the assignment is immaterial. 2. If the jury find that McClelland made the assignment with the intent and for the purpose of effecting a compromise with his creditors, or for the purpose of facilitating one already commenced, then the assignment is void, and you must return a verdict for defendant. 3. Bennett, under this assignment, does not stand in the position of a purchaser for a valuable consideration; and the fact (if such be the case) that he had no knowledge that it was McClelland's intention, in making the assignment, to effect a compromise with his creditors, cannot cure the effect of such intention on McClelland's part. If such intention existed on McClelland's part at the time he executed the assignment, it is void, no matter whether Bennett knew McClelland's intention or not, and your verdict should be for the defendant." The Court also, among other things, instructed the jury as follows, the plaintiff duly excepting: "If the real object or intent of McClelland in making this assignment was not the one expressed on its face, but to induce, persuade, or force creditors to agree and consent to a compromise which he was then attempting to make with his creditors, at fifty cents on the dollar, then, and in such case the assignment was fraudulent and void as to creditors. If McClelland executed the assignment with such fraudulent intent, it would be void as to creditors, even although Bennett, the assignee, had no notice or knowledge of such fraudulent intent at or prior to the time he accepted the assignment." The jury found a general verdict for the defendant, and an affirmative answer to the following question: "Did the assignor, McClelland, make this assignment with the intent and for the purpose of thereby effecting a compromise with his creditors?"

Bennett, Assignee, v. Ellison.

Judgment was entered on the verdict, and plaintiff appealed.

Charles C. Willson and Gilman, Clough & Lane, for appellant.

An act, to be tortious, must proceed from wrongful design to injure another, or a wrongful disregard of the rights of others, and it must be one which will have the effect to actually injure another, or in some way to actually impair his rights. (1 Addison on Torts, 2.) Conveyances of property by persons owing debts form no exception to the rule that the law does not regard wrongful designs unless they occasion harmful acts; and, if a creditor's legal rights in the collection of his debt are not impaired by the transfer of his property, it can make no difference to him what was the debtor's motives, or what he thought would be the effect of the transfer. (Bump on Fraud. Con., 360.) The validity of this assignment must be tried by the laws of the State, *i. e.*, by the common law as affirmed by the statutes of Elizabeth—since there is no statute of the State relating to transfers of personal property made with intent to hinder, delay, or defraud creditors. (Gen. St., c. 41, Title 3.) Neither the common law nor the statutes of Elizabeth require more of a debtor than that he should unreservedly devote all his property to the payment of his just debts. When a debtor has done this he has fulfilled his moral and legal obligations to his creditors. (Bump on Fraud. Con., 359.) The debtor may lawfully exhaust his entire property in payment of a single creditor if he has not more than enough to pay that one, and he may lawfully do this for the very purpose of defeating the collection, by some other creditor, of his demand. (Bump on Fraud. Con., 213, 220, 221, 226, 426, 441; *Holbird v. Anderson*, 5 Term Rep., 235; *Wood v. Dixie*, 4 Q. B., 892; *Darvill v. Terry*, 6 H. & N., 807; *Hartshorn v. Eames*, 31 Me., 93; *Banfield v. Whipple*, 14 Allen, 13.) And in this respect there is a clear distinction between conveyances made by way of payment of debts and those to third parties for a

Bennett, Assignee, v. Ellison.

new consideration. (*Hartshorn v. Eames*, 3, Me., 93.) An assignment of all his property by a debtor, for distribution among his creditors, will be valid as against all of them if there be no beneficial control reserved to the debtor, and no unreasonable delay in converting the property into money and distributing it. It does not matter that the effect of such transfer is to prevent the assignor's creditors from seizing the property transferred.

To prevent this is the very purpose of all such transfers, and the validity of a general assignment by an insolvent debtor, for the benefit of his creditors, is not affected by the fact that it was made with the express design to defeat the execution of some particular creditor. Even a stratagem to prevent an execution until an assignment can be made will not make the assignment void. (Bump on Fraud. Con., 358-360; *Riches v. Evans*, 9 C. & P., 640; *Crawford v. Austin*, 34 Md., 49; *Wolverhampton Bank v. Marston*, 7 H. & N., 148.) Such a general assignment without preferences is not merely lawful, but strictly accords with the fundamental principles of equity and fair dealing, and is to be commended and not condemned; and it must follow that an insolvent may rightfully resort to such an assignment to accomplish any lawful purpose—*e. g.*, to effect a compromise with his creditors. For an insolvent debtor to compromise with his creditors, and secure releases of their demands against him, is both moral and lawful, and is in the highest degree consistent with public policy. Few commercial communities have long existed without providing, by bankrupt and insolvent laws, for the discharge of such debtors from their existing obligations, and thereby restoring them to the ranks of the productive citizens of the State. Such laws spring less from compassion for the unfortunate debtors than from enlightened views of public interest. It being a lawful and politic thing for a debtor to effect a compromise with his creditors, he may lawfully influence his creditors to enter into such compromise by any act which is in itself harmless towards such creditors, and lawful; and one of the means to which he may lawfully resort to effect such a compromise is a general

Bennett, Assignee, v. Ellison.

assignment, such as is described in the plaintiff's request for instructions. In such a proceeding there is nothing like coercion of creditors into discharging their claims. The debtor merely gives them the choice between taking a specified per centum of their claims in full, and taking a fair and equitable share of all his present property, to be paid them within a reasonable time, looking for the residue to the possible future earnings of a man loaded with debts. The choice of the creditors between these alternatives is entirely free. There can be nothing immoral or unfair in a debtor holding out these alternatives to his creditors, and (in the absence of a bankrupt or insolvent act) his power to do so is that which alone makes any compromise with his creditors possible. If he could not set on foot a plan of compromise without keeping his property in his own hands, his offer of compromise, involving necessarily a confession of insolvency, would merely start a race of diligence among his creditors, with the result of satisfying the claims of a few by the sacrifice of all his assets, leaving the great bulk of the debts unpaid, and the debtor with no money to pay them—a state of things equally injurious to the creditors and the debtor. Again, if a debtor, making a general assignment, were obliged to wait until the estate had been wound up, and the proceeds distributed, before daring to think of a compromise with his creditors, his means for carrying out any compromise would be gone, he would have nothing to offer, and hence no compromise would be possible. One of the most powerful incentives to compromising with an insolvent debtor is the feeling of creditors that they all are, and will be, on equal footing in respect of the debtor's assets, that no one of them can sweep the assets from the rest. This perfect equality is produced by such an assignment, and is produced in a manner much more economical and effectual, and more beneficial to creditors, than by a resort to expensive and destructive proceedings in bankruptcy. Hence, every such assignment must, from its fairness and equity, operate as a strong inducement to creditors to compromise with their debtor, who, on his part, has a perfect right to expect that such will be its effect, and to

Bennett, Assignee, v. Ellison.

make it in that expectation. It is believed that no insolvent debtor ever made a general assignment for the benefit of his creditors who was not prompted by the feeling that to do so just an act would better his own condition; and it is monstrous to deny to an insolvent debtor the right to consider whether he will be benefited or harmed by a fair assignment of his property. The very reason why such general assignments are made by insolvent debtors is the expectation that their creditors will be thereby induced to grant them favors and indulgences, mostly by way of compounding their debts and releasing them therefrom. If such expectations could not lawfully be entertained, such assignments would rarely be made. The rule stated in *Guerin v. Hunt* (6 Minn., 375), that a fraudulent intent on the part of the assignor alone will avoid the assignment, is opposed to the weight of authority (Bump on Fraud. Con., 363), and the rule would promote frauds on innocent creditors rather than prevent them.

Since the intention of a person, when material, may be proved by his own direct testimony as a witness (*Berkey v. Judd*, 22 Minn., 287), an assignment, fair and valid to all appearances, may be defeated by procuring the assignor to swear that his secret intentions, at and before the time of making it, were fraudulent; and the debtor may easily form a corrupt combination with one or two creditors, whereby they could avoid the assignment and seize on the entire assets, leaving the other creditors without remedy. And where the assignee is himself a creditor, and, therefore, one of the beneficiaries, there can hardly be room for argument that he is a purchaser for a valuable consideration, within the meaning of the statutes of Elizabeth, and therefore the assignment is not affected by any fraud of the assignor, of which he had no notice. (*Holbird v. Anderson*, 5 Term Rep., 235; *Marbury v. Brooks*, 7 Wheat., 556; *Brooks v. Marbury*, 11 id., 78.)

Start & Benedict and *Jones & Gove*, for respondent.

GILFILLAN, C. J.—This is an action for taking and converting personal property. The plaintiff claims title to the prop-

Bennett, Assignee, v. Ellison.

erty under an assignment to him by James P. McClelland, for the benefit of the creditors of the latter. The defendant was sheriff, and had levied upon the property as the property of McClelland, upon executions against him.

The issue was as to the validity of the assignment. It was in the usual form of such assignments, authorizing the conversion of the property into money, by sale, as soon as the assignee should be able, and, after paying debts and taxes due the United States and the State, and the expenses, etc., of executing the trust, to distribute and pay the remainder, *pro rata*, among the creditors of the assignor, and if there should be any surplus after paying such creditors, to pay over such surplus to the assignor.

The jury found a general verdict in favor of the defendant, and the court also submitted to them for their special finding this question: "Did the assignor, McClelland, make this assignment with the intent and for the purpose of thereby effecting a compromise with his creditors?" To which the jury returned the answer, "Yes."

The proposed compromise which the evidence tended to prove, and to which the special verdict relates, was this: Prior to the assignment, McClelland made an effort to compromise with all his creditors upon his paying fifty per cent. in full of their demands, except the firm of which the plaintiff was a member, who were to receive their demand in full. A majority of the creditors had agreed to accept the proposed compromise, but others had refused to do so. By the schedule attached to the assignment, the debts of McClelland are stated at nineteen thousand nine hundred and eighty-two dollars and forty cents, and the value of his assets at thirteen thousand six hundred and seventy-five dollars.

After the proofs were closed, the plaintiff submitted to the court certain requests for instructions to the jury, mainly abstract propositions so far as regards the fact found by the special verdict, which fact must control the result of the controversy. So far as these propositions have any application to the fact as found, they are in substance these: First, that the

Bennett, Assignee, v. Ellison.

fact that the assignment was made with the intent and for the purpose of thereby effecting a compromise with McClelland's creditors did not render the assignment fraudulent; second, that, to render the assignment void as to the assignee, by reason of fraudulent intent on the part of the assignor, the assignee, when he took the assignment, must have had notice of such intent.

It is the intent with which conveyances of property are made, and not the terms in which they are expressed, that determines their validity as against the creditors of the assignor. If such intent be in any manner to hinder, delay, or defraud the creditors, they are void as against the creditors intended to be hindered, delayed, or defrauded, although they may be so expressed as, if carried out according to their terms, there would be no such effect. Assignments of all the debtor's property for the payment of his debts are tolerated, although there is incidental to them the delay necessary to the conversion of the property into money, and its distribution among the creditors. In this respect they may be regarded as an exception to the rule. But no other delay than such as is reasonably necessary to the application of the property to the payment of his debts is permitted.

On this ground a provision in an assignment, allowing the assignee to sell on credit, renders the assignment void. (*Greenleaf v. Edes*, 2 Minn., 264; *Nicholson v. Leavitt*, 6 N. Y., 510; *Brigham v. Tillinghast*, 13 id., 215.) Also, the sole purpose of the assignment must be to immediately appropriate the debtor's property to the payment of his debts. The reservation of any benefit or advantage to the debtor, before his debts shall be fully paid, will avoid the assignment. A discharge from his debts, without full payment, is such a benefit or advantage to the debtor as, if the assignment exact it as a condition of participating in the distribution, will avoid the assignment. (*Wakeman v. Grover*, 4 Paige, 23; s. c., *Grover v. Wakeman*, 11 Wend., 187.) That case goes so far as to hold that if a release of the debt is exacted as a condition to the right to a preference provided in the assignment, it renders the assign-

Bennett, Assignee, v. Ellison.

ment void. Mr. Justice Sutherland says (11 Wend., 200): "But where, instead of directly distributing his property among his creditors, as far as it will go, he places it beyond their reach by an assignment, not merely for the purpose of saving it from one particular creditor, to be given to another, or to be equally divided among all, but for the purpose of enabling him to extort from some or all of them an absolute discharge from their debts, as the condition of receiving a partial payment, he perverts the power to a purpose which it was never intended to cover, and which the principle on which the right to give preference is founded will not justify."

The assignment in this case was executed, as found by the jury, with the intent and for the purpose of thereby effecting a compromise with the assignor's creditors. The purpose in executing it, then, was to place the property beyond the reach of the creditors, in order to give the assignor time, and to place him in a position to be able to bring the creditors to compound their debts. To effect this, delay in appropriating the property to the payment of his debts would, of course, be necessary. The immediate application of the property to the demands of the creditors would be inconsistent with the purpose to effect a compromise by means of the assignment, and *vice versa*. The intent to effect a compromise by means of the assignment includes the intent to delay the execution of the trust expressed in it, at least so long as might be necessary for the assignor to ascertain if the creditors would compromise. This was an intent to delay beyond the delay which might be necessarily incident to the execution of the trust to sell property and pay the proceeds to the creditors, and was, therefore, fraudulent. The intent was also thereby to secure a benefit to the assignor, to wit, a discharge from his debts without full payment, and without even the application of all his property upon those debts. For these reasons the assignment was, as between the assignor and his creditors, void.

It has been decided by this court that an assignee, in an assignment for the benefit of creditors, is not regarded as a purchaser for a valuable consideration, when the assignment is

Weeks et al. v. Buderus.

assailed for fraud upon the creditors, and that knowledge in the assignee of the assignor's fraudulent intent is not necessary to enable the creditors to avoid the assignment. (*Gere v. Murray*, 6 Minn., 305.) That decision is in accordance with the weight of authority and with principle.

Judgment affirmed.

SUPREME COURT—NEW JERSEY.

JUNE, 1877.

A debtor in insolvency proceedings will not lose his right to a discharge by an accidental omission to give the required notice to one or more creditors.

CHARLES L. WEEKS et al. v. CHARLES BUDERUS.

F. McGee, for the plaintiff.

J. H. Lippincott, for the defendant.

DALRIMPLE, J.—This *certiorari* is brought to set aside a discharge in insolvency granted by the Common Pleas of Hudson to Buderus, the defendant in *certiorari*. The only objection to the legality of the proceedings below is, that the debtor failed to give notice of the hearing of his application to the plaintiffs in *certiorari*, upon whose execution he had been arrested and imprisoned. I am satisfied from the evidence presented that this omission was not intentional.

I can very well see how, under the circumstances, the debtor may have been led into the mistake which he made.

The plaintiffs were a firm composed of three individuals, doing business in the city of New York. Two of them were residents of the State of New York.

The other resided in the city of Newark, in this State, but, so far as appears, had no place of business in this State.

The defendant swears that he believed that the plaintiffs all resided in New York and that he assigned this fact before the

Hanscom v. Buffum et al.

Pleas, on hearing of his excuse for not serving the plaintiffs with the notice required by the statute. There is nothing to show that his failure to notify the plaintiffs was in bad faith or with sinister purpose. It is well settled by repeated adjudications, that under such circumstances, the debtor was legally entitled to a discharge.

The rule is, that the debtor in insolvency proceedings will not lose his right to a discharge by an accidental omission to give the required notice to one or more creditors. (*Jay v. Slack*, 1 South., 77; *Berry v. Arthur*, 1 Green, 308; *Hogan v. Hutton*, Spenc., 82.)

The order brought up is affirmed, with costs.

SUPREME JUDICIAL COURT—MAINE.

NOVEMBER 18, 1876.

Prior to the making of the general assignment, the debtor conveyed certain property to a firm of which the assignee was a member, for the purpose of giving such firm a preference over his other creditors. *Held*, That the assignee was not chargeable with the value of such property as against a creditor not a party to the assignment; that as between the firm and any creditor not a party to the assignment, they had a right to hold the property conveyed to them by the debtor.

The provisions of the Statute of Maine (Act of 1859, Chap. 112, Sec. 2), avoiding conveyances made in contemplation of insolvency to one creditor with intent to give him a preference, are made for the benefit of those who come in under the assignment, and are not to be extended to those who refuse to do so.

RUEL W. HANSCOM v. *JOHN W. BUFFUM* and
Trustee,

ASSUMPSIT on account annexed, to which no defense was made. The contention was as to the liability of the alleged trustee, on facts appearing in the opinion.

J. Baker, for the plaintiff.

W. P. Whitehouse, for the alleged trustee.

LIBBEY, J.—This case comes before this court on report of the disclosure of the trustee and the evidence taken, to be con-

Hanscom v. Buffum et al.

sidered as if allegations had been filed under the statute ; and the court is to determine whether the trustee is chargeable, and if so, for how much. From the disclosure and the evidence it appears that on the 18th or 19th of July, 1870, Buffum, the principal defendant, was insolvent ; that Whitehouse & Gould, a firm composed of Whitehouse, the trustee, and Oliver Gould, were creditors of Buffum, to about eight hundred dollars ; that Buffum contemplated making an assignment for the benefit of his creditors, under R. S. of 1857, Chap. 70, and Act of 1859, Chap. 112, additional thereto ; that he met Whitehouse and communicated to him his purpose ; and it was then agreed between the parties that Buffum should convey to Whitehouse & Gould a portion of his goods of the value of about four hundred dollars, for the purpose of giving them a preference over his other creditors ; and the conveyance was made by Buffum, and received by Whitehouse & Gould for that purpose, and applied in part payment of their debt ; and afterwards, on the 19th of July, 1870, Buffum made an assignment of all his property not exempt from attachment, to Whitehouse, for the benefit of his creditors. Whitehouse accepted the trust ; and it is not claimed that his subsequent proceedings in probate court were not in conformity to the provisions of the statute. He accounted for all the property that passed to him by virtue of the assignment, except the goods sold to Whitehouse & Gould as aforesaid, and made an equal distribution of the same, and paid over to the creditors who became parties to the assignment prior to the service of the plaintiff's writ. The sale of the goods to Whitehouse & Gould was made as part payment of their debt, and was without fraud, except the design of giving a preference to them over other creditors.

Plaintiff claims that the trustee is chargeable on two grounds :

First, That the sale of the goods to Whitehouse & Gould was fraudulent as to the creditors of Buffum. (R. S., 1857, Chap. 86, Sec. 63.)

Second, That by virtue of the assignment, the goods sold to Whitehouse & Gould passed to Whitehouse as assignee ; and

Hanscom v. Buffum et al.

as he did not account for them in his settlement in the Probate Court, he is chargeable for the amount or excess of the estate remaining in his hands after the payment of the debts of the parties to the assignment and lawful expenses. (Act of 1859, Chap. 112, Sec. 1.)

The trustee is not chargeable on the first ground claimed by the plaintiff. The case is not within the provisions of R. S., 1857, Chap. 86, Sec. 63. That statute is applicable only to conveyances fraudulent and void as to creditors at common law. At common law, a payment, by an insolvent debtor, of the debt of one creditor for the purpose of giving him a preference over his other creditors, was not void as to them.

The Act of 1859 (Chap. 112, Section 2) did not change the common law as to the right of an attaching creditor. By that statute a conveyance or transfer by the assignor, previous to making the assignment in contemplation thereof, to a pre-existing creditor in payment of his debt, with the design to give him a preference, is void; and the property so conveyed passes to the assignee by virtue of the assignment, to be held by him as assets for the benefit of creditors; and he is clothed with all necessary power to recover, receive, and collect the same.

The words of the statute avoiding conveyances made in contemplation of insolvency to one creditor, with the design of giving him a preference over other creditors, are general; but they are to be construed in connection with, and are limited by, the subject to which they relate. The object of the statute is to secure an equal distribution of the estate of the insolvent debtor among all of his creditors. Such conveyance is void only as against the assignment.

The statute does not affect the conveyance prior to making the assignment. It applies only to a conveyance or transfer made by the assignor; and the property passes to the assignee to be held by him in trust for the benefit of all the creditors who become parties to the assignment. The provisions of the statute are made for the benefit of those who come in under it to share the effects of the insolvent equally, and are not to be extended to him who refuses to come in under the assignment,

Martin et al., Assignees, v. Pillsbury et al.

and yet would avail himself of the terms of the act to secure his whole debt.

If the statute affected the conveyance or transfer before the assignment, and rendered it void as to attaching creditors, then before the assignment one creditor might attach and hold the property thus conveyed, and prevent its passing to the assignee by virtue of the assignment, as the assignment does not dissolve prior attachments, and thus defeat the main purpose of the act, the equal distribution of the estate of the insolvent debtor among his creditors. (*Penniman v. Cole*, 8 Met., 496.)

Nor is the trustee chargeable on the second ground claimed by plaintiff. He never, as assignee, recovered possession of the goods conveyed by the debtor to Whitehouse & Gould, as part of the estate of the debtor; and those goods were not an excess of the estate of the debtor remaining in his hands after the payment of the debts of the parties to the assignment and lawful expenses. As between Whitehouse & Gould and any creditor not a party to the assignment, they had a right to hold the property conveyed to them by the debtor. No creditor not a party to the assignment had a right to impeach their title. When the assignee has taken from the assignor, before the assignment, a conveyance of property for the purpose of obtaining a preference, the remedy for the creditors who have become parties to the assignment, is in the probate court to require the assignee to account for such property in the settlement of his account.

Trustee discharged. APPLETON, C. J., WALTON, DANFORTH, VIRGIN and PETERS, JJ., concurred.

SUPREME COURT—MINNESOTA.

OCTOBER 20, 1876.

Defendants purchased lumber of one J., who two days later made a general assignment. At the time of said purchase defendants held J.'s note, which matured before they received notice of the assignment. In an action by the assignees to recover the price of the lumber, *Held*, That

Martin et al., Assignees, v. Pillsbury et al.

defendants were entitled, under the Statute of Minnesota, to set off the amount due them on the note.

JOHN MARTIN et al., Assignees, v. CHARLES A. PILLSBURY et al.

THIS action was brought in the Court of Common Pleas of Hennepin County, by plaintiffs, as assignees of William S. Judd, under a general assignment for the benefit of creditors, to recover the price of lumber sold by Judd to defendants. The defendants answered, alleging a set-off, as stated in the opinion. A demurrer to the answer was sustained by Young, J., and the defendants appealed.

Cross & Hicks, for appellants.

D. A. Secombe, for respondents.

BERRY, J. On March 12, 1875, William S. Judd made a negotiable promissory note for five hundred dollars, payable in three months. Prior to June 12th, following, the note was sold and transferred to defendants. On June 12th defendants purchased of Judd a quantity of lumber, for four hundred and fifty-two dollars and thirty cents, payable June 30. On June 14, Judd made a general assignment of all his property to plaintiffs for the benefit of his creditors. Allowing grace, the note fell due on June 15. Defendants had no notice of the assignment until after maturity of the note. The plaintiffs bring this action to recover the price of the lumber. Defendants answer, setting up the facts above stated, as also Judd's insolvency, and ask to have the amount due them on the note set off against the plaintiffs' claim.

From an order sustaining a demurrer to their answer, defendants appeal. Our statute (Gen. St., Chap. 66, Sec. 27) provides that in the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before notice of, the assignment. The words "existing at the time of, or before notice of, the assignment," apply to set-offs as well as to other defenses. (*Harris v. Burwell*, 65 N. C., 584; *McCabe v. Grey*, 20 Cal., 509.) As respects his right to interpose a set-off or other de-

Martin et al., Assignees, v. Pillsbury et al.

fense, the effect of the statute is that, until he has notice of the assignment, the defendant occupies the same position as if the thing in action assigned was still held by the assignor. In the case at bar, the defendants, at the time they received notice of the assignment, were holders of a matured note against the assignor; the claim assigned to the plaintiffs was not due, and the assignor was insolvent. This state of facts brings the case within the doctrine of *Lindsay v. Jackson* (2 Paige, 581). This doctrine is succinctly stated in *Bradley v. Angel* (3 N. Y., 475), as follows: "A. having a demand against B., which is due, and B. one against A. not due, A. may in equity compel a set-off, if B. is insolvent. (See also, *Colyer v. Craig*, 11 B. Monroe, 73.) Upon the construction which we have given to the statute the defendants, as respects this equitable right of set-off, which accrued before notice of the assignment, occupy the same position as if the thing in action assigned was still held by the assignor. It is, therefore, available in their favor against the plaintiffs. For the purpose of maintaining his position, that no debt or demand not due at the time of an assignment can be set off, within the meaning of the statute before quoted, the counsel relies upon several cases from New York, especially upon *Martin v. Kunzmüller* (37 N. Y., 396). In New York the statute under which the case cited was decided is as follows, viz.: "If the action be founded upon a contract, other than a negotiable promissory note or bill of exchange, which has been assigned by the plaintiff, a demand existing against such plaintiff or any assignee of such contract at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of such assignment, may be set off to the amount of the plaintiffs' debt, *if the demand be such as might have been set off against such plaintiff or such assignee while the contract belonged to him.*" The latter clause (which we have italicised) is not found in our statute, which is, therefore, in our opinion, so essentially and materially different from the Statute of New York as to render decisions based upon the latter inapplicable, so far as the point involved in the case at bar is concerned.

Order reversed.

Rhoads v. Blatt et al.

SUPREME COURT—PENNSYLVANIA.

MARCH 28, 1877.

Real estate does not pass to the assignee under an assignment of "all the goods, chattels, effects, and property of every kind, personal and mixed," of the assignor; nor can the assignee make any claim upon the proceeds thereof, after a sale and conversion by the assignor.

In a sale by an insolvent vendor, inadequacy of price is evidence of fraud.

SAMUEL L. RHOADS v. REUBEN BLATT et al.

THIS was an attachment execution issued by Samuel L. Rhoads to the use of John Wilhelm against Reuben Blatt, wherein Aaron Blatt was summoned as garnishee. The garnishee pleaded *nulla bona*, with leave, etc., and issue. The case was this:

On the 21st of January, 1871, Rhoads obtained a judgment against Reuben Blatt which, on the 16th of June, 1874, was marked to the use of Wilhelm.

On the 26th day of April, 1871, Reuben Blatt, being seized of an undivided interest in a farm which has descended to him and his brothers and sisters from their father, Benjamin R. Blatt, under the intestate laws, executed an assignment for the benefit of creditors to John K. Derr, of "all the goods, chattels, and effects and property of every kind, personal and mixed, of the said Reuben Blatt," which assignment was duly recorded on the day of its date.

The 12th day of May following, the assignee filed an inventory, wherein said interest was appraised at two thousand dollars. The assigned estate of Reuben Blatt was settled and proved insolvent, paying the creditors a *pro rata* dividend of only twenty-three and a half per centum.

On the 7th day of August, 1871, proceedings in partition were commenced, which terminated in Aaron Blatt, the brother of Reuben, accepting the above-mentioned farm at the valuation thereof, to wit, twelve thousand nine hundred and twenty dollars, and entering into a recognizance to secure the shares

Rhoads v. Blatt et al.

of his brothers and sisters. The widow died, and the interest of Reuben Blatt in the recognizance aforesaid was two thousand five hundred and eighty-three dollars and ninety-nine cents. Reuben Blatt made assignments of portions of his interest in said recognizances to divers persons, some dated before and some after his assignment for the benefit of creditors, aggregating one thousand four hundred and twenty-three dollars and thirty-one cents, with a small amount of interest. This left a balance of one thousand one hundred and fifty-nine dollars and ninety-eight cents with interest due Reuben from Aaron. This attachment execution was issued and served upon Aaron Blatt, who was summoned as garnishee. Upon being ruled to reply to interrogatories, he filed answers, admitting that he had in his possession the above balance, but alleging that Reuben had, on the 31st day of July, 1872, assigned it to J. Warren Tryon, Esq.; the consideration mentioned in this assignment being four hundred dollars, the receipt whereof was acknowledged therein. The cause was then put at issue, and at the trial before Sassaman, A. L. J., the plaintiff contended that this assignment to Tryon was made with the intent to defraud creditors, but the court ruled that there was no evidence of fraud. In their general charge they also held that the real estate of Blatt passed to the assignee for the benefit of creditors, and if it did not at the time of the assignment it subsequently did when converted into personalty after the proceedings in partition; and therefore the remedy of plaintiff must be against said assignee, and the jury were instructed to find for defendants.

The plaintiff took this writ, assigning these rulings of the court for error.

Cyrus G. Derr, for plaintiff in error.

The real estate did not pass to the assignee for creditors, as no apt words were used in the assignment, and the use of words "personal and mixed," excluded the realty. "If the land did not pass, the money arising from a sale thereof did not pass.

Rhoads v. Blatt et al.

The inadequacy of the consideration named in the assignment to Tryon was evidence of fraud, the assignor being largely indebted. (*Davidson v. Little*, 10 Harris, 245.)

Henry C. G. Reber, for defendants in error.

PAXSON, J.—It is manifest that the real estate of Reuben Blatt did not pass by his assignment for the benefit of creditors. By that instrument he assigned “all the goods, chattels, and effects and property of every kind, personal and mixed, of the said Reuben Blatt.” Whatever might have been the effect of the words, “goods, chattels, effects and property of every kind,” had they stood alone, the addition of the words “personal and mixed” certainly limited them to the personal estate. It is equally clear that if the real estate did not pass by the assignment, the assignee could have no claim upon the proceeds thereof, after a sale and conversion by the assignor.

The question of fraud should have been submitted to the jury. The learned judge refused the plaintiff's first point upon the ground that there was no evidence of fraud. This was error. The record shows that Blatt was insolvent. He had made an assignment for the benefit of his creditors. It appears from the report of the auditor that his estate yielded but a small dividend. The assignment to Mr. Tryon was of a claim of one thousand two hundred dollars, charged as a first lien upon a farm said to be worth thirteen thousand dollars. The consideration for the transfer of this claim was four hundred dollars. In a sale by an insolvent vendor inadequacy of price is evidence of fraud. It was said in *Davidson v. Little* (10 Harris, 245) that “the sale of lands or goods by an indebted person for less than their value is *ipso facto* a fraud in both vendor and vendee.

The judgment is reversed, and a *venire facias de novo* awarded.

Jordan et al., Assignee, v. Sharlock.

SUPREME COURT—PENNSYLVANIA.

JUNE 4, 1877.

Defendant made a note at ninety days, which was discounted and held by a bank in which he had an account. Before the maturity of the note the bank made a general assignment for the benefit of creditors. In an action brought by the assignees on the note, *Held*, That defendant had a right to set off a balance due him on his deposit account at the date of the assignment.

FRANCIS JORDAN et al., Assignees, v. MARTIN SHARLOCK.

AMICABLE action by Francis Jordan and George W. Porter, assignees of the City Bank, against Martin Sharlock, in which the following case was stated for the opinion of the court :

“ 1. That the defendant had a running account of deposits in said City Bank, from 22d November, 1875, to 6th September, 1876, on which, at said last-mentioned date, there was a balance due to said defendant of three hundred and ninety-five dollars and fifty cents. /

“ 2. That on the thirteenth day of June, 1876, said defendant made, and had discounted at said bank, the following note, viz.:

“ ‘ \$350.00.

BALDWIN, June 13th, 1876.

“ ‘ Ninety days after date I promise to pay to the order of Samuel Witmer, three hundred and fifty dollars, at City Bank of Harrisburg, without defalcation, for value received.

(Signed)

“ MARTIN SHARLOCK.

“ ‘ S. WITMER.’

“ 3. That on the 7th of September, 1876, the City Bank made an assignment of all its property and effects, including said note, to the plaintiff, in trust for the payment of debts, and said assignment was duly acknowledged and recorded the same day.

“ 4. That said note was duly endorsed on the day of its date,

Jordan et al. v. Sharlock.

by said Samuel Witmer; and on its maturity, on the fourteenth day of September, 1876, was duly protested for non-payment, the plaintiff refusing to allow the defendant a set-off, as claimed by him, for said deposit of three hundred and ninety dollars and fifty cents, or any part thereof, in payment of said note, the assets of said bank being insufficient to pay the debts.

"5. If, under these facts, the plaintiff is entitled to recover, then judgment to be entered for the plaintiff, for said sum of three hundred and fifty dollars, with interest thereon from the said 14th September, 1876, with two dollars and ten cents costs of protest; and if the said plaintiff be not entitled to recover, then judgment for said defendant for the sum of forty-five dollars and fifty cents, with interest thereon from said 14th September, 1876."

The court, HENDERSON, A. L. J., delivered an opinion *inter alia*, saying:

"It is held in general, in this country, that when the consideration on which the debts in question were based, respectively, is mutual, the period at which they become due is immaterial. The better opinion would seem to be, that demands, which were mutual in the lifetime of the parties, may be set-off after their deaths, though not due when it happened, if they become due before action brought. And where the estate is insolvent—where, after suit is commenced by the administrator, the estate of his intestate is represented insolvent, the defendant may set-off a note against the intestate which falls due pending the suit, though not due and payable when the action was commenced. And, again, where an estate is represented insolvent, all mutual demands of every nature and kind are to be set off, and the balance only is the debt due to the estate. In case of an insolvent estate, as there must be a final settlement of all demands, it follows, as a necessary consequence, that a *debitum in presenti*, although not a debt due, is within the principle and may be set off. (*Bigelow v. Folger*, 2 Metcalf, 255.) This may go further, and seem inconsistent with the principle enunciated in *Bosler v. Exchange Bank*; but when we consider that insolvency is the shifting factor that disturbs

Jordan et al. v. Sharlock.

the equilibrium of these cases, and that considerations of public policy enter into the solution of the cases in which 'the debt' is a deposit in bank, we are constrained to think that the spirit and reason of the Pennsylvania decisions are in accord with the general doctrine stated above. (*Murray v. Williamson*, 3 Binn., 135; *Stuart v. The Commonwealth*, 8 Watts, 74; *Cramond v. Bank of the United States*, 1 Binn., 64.) The court directed judgment to be entered in favor of the defendant, and the plaintiff took this writ, assigning this entry of judgment for error.

Hall & Jordan, for plaintiff in error.

The right to set off the deposit in payment of the note would have existed had the note been due prior to the date of the assignment; but, not being then due, the right is denied. The assignment was a legal transfer of the insolvent's property, including the note in question, in trust for the payment of debts, just as the death of an insolvent debtor works a legal transfer of his personal estate in trust for the benefit of the creditors of such decedent.

This case is ruled by *Bosler v. Exchange Bank* (4 Barr., 32), and the appeal of the *Farmers and Mechanics' Bank* (12 Wright, 57); and the principle of these cases is supported by *Poorman v. Goswiler* (2 Watts, 69); *Beeler v. Turnpike Co.* (2 Harris, 162); and *Singerly v. Fox* (25 P. F. Smith, 112).

John H. Weiss, for defendant in error.

The assignee is the mere representative of the debtor, and is bound where the latter would be bound. He is the mere hand of the assignor in the distribution of the fund, and not the representative of the creditors. (*In re Fulton's Estate*, 1 P. F. Smith, 211.) The assignees succeeded only to the rights and equities of the assignor, and as the defendant can set off this debt as against the assignor, he can as against the assignees.

Jordan et al. v. Sharlock.

CHIEF JUSTICE AGNEW delivered the opinion of the court, June 4, 1878. In *Re Fulton's Estate* (1 P. F. Smith, 211), it is said: "Perhaps nothing is better settled in this State by uniform and numerous decisions than this, that a voluntary assignee is the mere representative of the debtor, enjoying his rights only, and no others; and is bound where he would be bound; that he is not the representative of the creditors, and is not clothed with their powers; that he is but a volunteer, and not a bona fide purchaser for value.

Many cases are cited for these propositions. Martin Sharlock made his note of three hundred and fifty dollars, June 13, 1876, at ninety days, which the City Bank discounted and held on and before the maturity of the note. He had a running account of deposits in the bank before and during the running of the note, in which there was a balance due him, September 6, 1876, of three hundred and ninety-five dollars and fifty cents, the bank then being the holder of the note. The bank made a voluntary assignment for the benefit of creditors on the 7th of September, 1876. When the note passed by this assignment to the assignees, Sharlock was the creditor of the bank and had an immediate right of action against it. The assignees, being the mere representatives of the bank and not purchasers for value, took the note subject to his right of set off. It is clear, according to the authorities, that the bank conferred upon the voluntary assignees no right greater than their own, which was a right of action when the note fell due, subject to the existing set-off.

Bosler v. The Exchange Bank (4 Barr., 32), and its sequents, were decided on a widely different principle. When Bosler died the bank had no debt due for which it could sue, while Bosler's right of action was perfect before his death. But at the moment of his death the law took possession of his estate for the benefit of his creditors, he being insolvent. It was not the case of a mere voluntary transfer; but new rights sprang into being on the instant of his death. At his death, the debts did not *ipso facto* conceal each other, for the reason that the bank had no immediate right of action. Consequently,

Francis v. Rankin.

when the estate by operation of law passed into legal administration, and was *in gremio legis*, the rights of creditors immediately attached, and the estate being insolvent, equity demanded equality among the creditors of the same class. Hence, the right of the bank as a creditor was to a pro rata only. But a voluntary assignment has no such effect. It does not alter the status of the rights of the creditors, as death does of the decedent's estate. It is true the duties and obligations of the assignees are regulated by law, but the transmission of the estate to them is the merely voluntary act of the debtor, who cannot impair the rights of creditors which had attached before his act. We discover no error in the record, and the judgment is affirmed.

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SUPREME COURT OF ILLINOIS.

Securing one creditor to delay of others.

Debtor securing creditor.

One creditor may be secured, if done in good faith, though others may be injured.

FRANCIS v. RANKIN.

Stewart & Phelps, for appellant.

John J. Glenn, for appellees.

Scorr, J.—The property in controversy was seized under writs of attachment against the goods of Henry Van Tuyl, who had left the State, and this proceeding was instituted to try the right of property. Claimant was security for the absconding debtor for a considerable sum of money, and to save himself against loss on account of such suretyship, he took a chattel mortgage on the property, consisting chiefly of a lot of corn standing in the field. After Van Tuyl had left, he took possession of such articles of personal property embraced in the mortgage as he could find, and also such possession as was

Bartlett v. Blaine.

practicable of the corn then unharvested. While the property was so in possession of claimant, it was seized by the creditors of Van Tuyl under writs of attachment.

Without discussing the merits of the case, we think the judgment ought to be reversed because of the refusal of the court to give the third instruction in the series asked on behalf of claimant. It states the principle—a debtor may secure a creditor, where it is done in good faith, notwithstanding the ultimate effect might be to delay other creditors. (*Thornton v. Davenport*, 1 Scan., 296.) No instruction given contained this principle, and, as it was applicable to the facts of the case as developed by the evidence, it ought to have been given.

On account of the error indicated, the judgment will be reversed, and the cause remanded.

Judgment reversed.

SUPREME COURT OF ILLINOIS.

Fraudulent representations as to composition agreement.

Fraud representation.

Plaintiff must show himself to have been injured by, to recover, and the rule holds good as to representations concerning composition agreement.

BARTLETT v. BLAINE.

McClellan, Hodges & Cummins, for appellants.

Frederick Ulrich, for appellee.

DICKEY, J.—This is an action on the case for fraud by appellants against appellee. The plea was, not guilty. The verdict was, not guilty, and judgment for appellee for costs, and appellants appeal to this court.

Counsel for appellants do not contend that any right of recovery was shown except under the second count in the declaration. Under that count it was proven on the trial that, on

Bartlett v. Blaine.

the 10th day of February, defendant was indebted to plaintiffs in the sum of two thousand and ninety-four dollars and sixty-seven cents, and that he was indebted to other creditors, amounting in all to the sum of sixty-two thousand, two hundred and ninety-seven dollars and seventeen cents, and that his assets at the time were of the value of thirty-five thousand, eight hundred and thirty-six dollars; that proceedings in bankruptcy instituted against appellee were pending in the Federal Court; that appellee was trying to induce all his creditors to sign articles of compromise by which each should accept fifty cents on the dollar and release appellee; that most of the creditors had consented to do so, and had signed the composition agreement, and among them, Peake, Opdyke & Co. had signed, whose claim was four thousand, seven hundred and two dollars, and forty-five cents; that, under these circumstances, Blaine called upon Hodges, the attorney and agent of plaintiffs, and induced him to sign the firm name of appellants to the article of settlement in consideration of the fifty per cent. they should receive under the composition and in consideration that certain representations made by Blaine at that time were true; that, before so signing, Hodges, on behalf of plaintiffs, demanded and received from Blaine a statement in writing signed by him, in which he, among other things, stated that (other than three hundred dollars to be paid to one Colby for his services, and to cover costs in the bankruptcy proceedings): "*No person has received, or shall receive, any other compensation in the premises, directly or indirectly.*" Proof was also given tending to show that before the time when Blaine signed this statement he had signed a note of five hundred dollars to one Bullene, an agent of Peake, Opdyke & Co., to induce Bullene to procure his principals to sign the composition articles, and that at the time Blaine signed such statement, this five hundred dollar note was outstanding. Proof was also given tending to show Blaine had been sued on this five hundred dollar note, and had defended the same on the ground that it was void for duress in the procuring of its execution, and that on a trial on the merits in that case it was so adjudged.

Bartlett v. Blaine.

In this case plaintiffs were paid the amount provided for in the composition articles, and then sued for the balance of their original claim, seeking to avoid the effect of the composition on account of the fact that this Bullene note had been given; and therefore the statement of Blaine, upon which the composition was accepted by plaintiff, was untrue when it was made.

This Bullene note was adjudged void. Void things in law are equivalent to *no* things. The existence of a void note was not in substance incompatible with the statement that "No person had received any other thing," etc. This is not sufficient to invalidate the contract of composition.

Again, a mere *fraudulent* representation is not actionable *per se*. If a man utter slanderous words of his neighbor, the neighbor may have his action, though he be not damaged by the words spoken. If a man, upon a valuable consideration, promise to another that he will do any given thing, and fail to perform his promise, an action lies for the breach of promise, though no damage be done. Not so with an action for fraudulent representations. In such action the plaintiff must not only show that the representations were made, and that they were false and fraudulent, but he must also show affirmatively that he has been injured thereby—that he is in some way in a worse condition than he would have been had the words been true.

In this case no such thing is shown. Plaintiffs have never been called upon to pay this note to Bullene, nor could they be. The existence of the note has in no way prevented them from getting promptly their fifty per cent. upon their claim, according to the terms of their contract. It is said, however, that they were thereby induced to sign the composition articles, but there is no attempt to prove that they are in any worse condition than they would have been if they had not signed.

They had a claim against a man, insolvent, his hands tied by a bankruptcy proceeding pending with over sixty thousand dollars liabilities, and only about thirty-five thousand dollars of assets.

In re Oakley, Assignee.

No proof is offered to prove that the demand of plaintiffs under the circumstances, was of any greater value than the money they accepted therefor.

The plaintiffs on the record failed to make out a cause of action at the trial below. Assuming all the evidence given in their behalf to be true, and adopting all the inferences which might reasonably be drawn from the evidence in plaintiff's favor, no cause of action is shown.

Judgment affirmed.

NEW YORK COMMON PLEAS.

SPECIAL TERM, OCTOBER, 1878.

In re Accounting of A. OAKLEY, Assignee.

It is not necessary for creditors, whose claims are inserted in the schedules of an assignment, under the Act of 1877, Chap. 466, to present them to the assignee with vouchers in order to participate in the fund on the accounting of the assignee.

The practice in similar cases prior to the General Assignment Act of 1860, as recognized in *Kerr v. Blodgett*, (48 N. Y., 62), is not now applicable under the general assignment acts.

In an accounting under the latter the court has no power to make an order requiring creditors to appear and prove their claims or be excluded from any share of the assigned estate.

Disputed claims are to be tried by special order of the court, and upon due notice to the creditor whose claim is attacked. No creditor is bound to come to the assignee or referee with his proof of his claim.

J. F. DALY, J.—The assignee having advertised for creditors to present to him their claims, with the vouchers thereof duly verified, pursuant to Section 4 of the Act, Chapter 466, Laws 1877, and a limited number only of the creditors named in the assignor's schedules having appeared and proved their claims, these creditors and the assignee now contend that all the other schedule creditors are cut off from any share of the estate. The authority relied on is *Kerr v. Blodgett* (48 N. Y., 62). It was there held that in an action in equity (commenced prior to the General Assignment Act of 1860), by the creditor

In re Oakley, Assignee.

of an assignee on his own behalf and on behalf of all other creditors of the assignors against the assignee for an accounting, it was according to the practice of the courts of equity to make an interlocutory order referring the account of the assignee, and directing advertisement to be made for creditors to present their claims to the referee, and decreeing distribution of the estate among those only who proved their claims, and that the interlocutory order was for the benefit of all the creditors, and bound them all, whether they had actual notice or not and that after the estate was distributed a creditor who had failed to appear and prove his claim after such advertisement had no remedy.

In an accounting under the General Assignment Acts (1877, Chap. 468; 1878, Chap. 318), the court has no power to make an order requiring creditors to appear and prove their claims or be excluded from any share of the assigned estate. The advertisement for claims authorized by Section 4 of the Act of 1877, is made by the *assignee*, and nothing in the act can be construed into a provision cutting off from a distributive share a creditor who does not present his claims. The advertisement ordered in equity suits requires the creditors to appear before a referee, who exercises judicial functions in examining and allowing and rejecting claims presented. The assignee has no such judicial power. The creditors of the assignor whose names appear on the schedules as creditors with the proper statement of their claims, need not, unless such claims are contested, present his demand to the assignee in order to obtain a dividend. The filing of the schedules in court under the provisions of the Act (Section 3), is a presentation of the claims therein admitted to the court, and is *prima facie* evidence of the indebtedness of the assignor to the persons named as creditors. The fact is before the court and cannot be ignored.

Before the passage of the General Assignment Acts there was no provision of law requiring the making up, verifying and filing schedules in cases of assignments for the benefit of creditors. There was no method by which the court could ascertain who were the creditors of the assignor except by advertisement,

In re Oakley, Assignee.

which was always directed in the interlocutory judgment. Such persons only as appeared before the referee and proved their claims were deemed to have claims, and the court was ignorant that others existed. In cases under the General Assignment Acts the proof of the claim is before the court, the assignee and the referee, duly presented and verified by the assignor.

One object of advertising for claims under Section 4 of the Act is to notify creditors, whom the assignor may have omitted (either intentionally or unintentionally) from his schedules, to come and present their claims to the assignee. It is also intended to relieve the assignee from the necessity of giving notice of the subsequent proceedings in accounting to creditors who have not presented their claims (Section 12, subd. 13), but nothing in the Act warrants the construction that it intended to cut off from participation in the fund creditors whose claims have been presented and authenticated by the assignor in his schedules and who have not come forward (their claims not being attacked) to make further proof. Under Section 4, after advertisement a creditor is not bound to do more than present his claim to the assignee. This has been already done for him by the assignor. He has no proofs to produce because the assignee has no judicial power to examine and determine upon proofs. Disputes as to claims are to be tried before a referee or jury on special order of the court (Section 26) and parties who unsuccessfully dispute a claim must pay the costs of the litigation. Unless an order be made under the 26th Section for the trial of disputed claims, and after due notice to the creditor whose claim is attacked, no creditor is bound to come to the assignee or referee with his proof.

Report referred back.

Rockwell v. McGovern.

NEW YORK COURT OF APPEALS.

APRIL TERM, 1877.

ROCKWELL v. MCGOVERN.

An assignment, which upon its face purports to have been made under the provisions of the N. Y. Revised Statutes, relating to "voluntary assignments made pursuant to an application of an insolvent and his creditors" (2 R. S., p. 16), is invalid as a conveyance of the insolvent's estate when the preliminary proceedings upon which it is based are void.

Such an assignment was only for the creating of a statutory trust for the purposes of the statute; when that failed no estate vested in the assignee, notwithstanding the mention of a nominal sum as the consideration of the assignment.

APPEAL from a judgment rendered by the General Term of the Superior Court of New York City.

ANDREWS, J.—In the year 1845, Isaac V. Paddock, who then owned the lot in controversy, presented to the County Judge of Westchester County a petition signed by himself and certain of his creditors, for his discharge from his debts, under the provisions of Art. 3, Chapter 5, Tit. 1, Part 2, of the Revised Statutes, relating to "voluntary assignments made pursuant to an application of an insolvent and his creditors." The judge entertained the proceeding, and it was carried so far that an assignment of the insolvent's estate was directed, and the petitioner executed an assignment to the plaintiff Rockwell. The assignment recited that it was made under and in pursuance of the statute to which reference has been made, and in pursuance of an order of the county judge, and it purported to grant, assign, and transfer to the plaintiff Rockwell all the estate of the assignor in law and in equity, for the benefit of all his creditors, "according to the statutes aforesaid." The assignment also expressed a nominal consideration of one dollar. The petition in the proceedings was fatally defective, and conferred no jurisdiction upon the officer, and the plaintiffs on the trial conceded that the proceedings were null and void.

It does not appear whether a discharge was granted, or that

Rockwell v. McGovern.

any step was taken subsequent to the assignment, or that the assignee qualified, or assumed to act as assignee until the sale now to be mentioned.

In 1869, twenty-four years after the assignment, one Townshend, an attorney, who, so far as appears, was not a creditor of the insolvent, or in any way interested in the execution of the supposed trust, applied to the plaintiff Rockwell to sell the lot in question, and promised to remunerate him if he would consent to make the sale. The assignee thereupon advertised the lot for sale at public auction, and on the sale it was bid off by Townshend for \$100, and at his request, as we are authorized to infer, was conveyed by the assignee to his sister-in-law, who soon afterward, without any consideration received by her, conveyed it to the plaintiff, May H. Townshend, the wife of the attorney who procured the sale. The assignee did not know, until he was so informed by Townshend, that Paddock owned the lot when the assignment was made. Paddock died in 1864, and no notice of the proceedings for the sale of the premises by Rockwell was given to his heirs, otherwise than by publication of the notice of sale.

It is a fatal objection to the right of the plaintiffs to recover, that the assignment, being based upon the void insolvent proceedings, was void, and conveyed no title to the assignee. The assignment was one step in the proceedings, and the trust which the parties, under the direction of the judge, and in supposed compliance with the statute, attempted to create, could not be carried into effect.

That Paddock's purpose was to create a statutory trust, under the provisions of the Insolvent Debtor Act, is apparent on the face of the assignment. His sole object in making it was to obtain, through a compliance with the statute, a discharge from his debts under its provisions. The assignment declares that it was made under and by virtue of the statute, and the order of the judge, for the benefit of creditors according to the statute, and the assignee is stated to have been nominated by the creditors.

The proceedings having been without jurisdiction, no law-

Rockwell v. McGovern.

ful discharge of the debtor from his debts could be granted under them. The purpose of the assignment failed, as also the consideration upon which it was founded.

The statute contains special and minute provision for the administration for the estate of the insolvent, when an assignment has been made under its provisions. It prescribes the duties and powers of the trustees, provides the mode of ascertaining the creditors, and for barring those who fail to present their claims as provided in the act, from sharing in the distribution; for priority of payment of debts of a certain class; and for an allowance to the debtor out of the estate in a certain contingency before creditors have been fully paid. (2 Rev. St., Art. 8, Chap. 6, Tit. 1, Part 2.) In short, the statute contains a special system of administration adapted to carry out the special trust created by an assignment under it, and are inapplicable in many particulars to the case of an ordinary voluntary general assignment in trust for creditors.

The assignment cannot be regarded as valid as a conveyance of the insolvent's estate, when the preliminary proceedings upon which it is based are void, as not in conformity with the statute. The trustee could not take in the character as for the purposes, or with the powers specified in the statute, and the reasonable construction of the transaction is, that no estate vested in him under the assignment. The assignment failed with the other proceedings, and did not divest the insolvent of his title to his estate. (See *Ely v. Cooke*, 28 N. Y., 374.)

The mention of a nominal pecuniary consideration in the assignment is not material. It clearly appears by the assignment itself that the intention was to create a statutory trust, and to convey no other estate or interest than was required for that purpose. The mention of a nominal consideration was a formal and an unnecessary proceeding, but the other parts of the instrument indicate with certainty the true character and intent of the transaction. There was no intention to give the assignee a beneficial interest in the estate, or to invest him with any trust or interest other than that prescribed by the statute. (See *Morris v. Ward*, 36 N. Y., 587.)

Lamar Insurance Co. v. Moore.

When the intention of a grantor is to convey a fee, and the deed is otherwise effectual, it is not invalid because it purports to be executed in pursuance of an invalid judgment. (*Striker v. Mott*, 28 N. Y., 90; *Same v. Stiles*, 14 Pet., 322.) This is not a conveyance of that character. It is unnecessary to consider what the rights of a *bona fide* purchaser for value of the land from the assignee, without notice of the defect in the proceedings, would be. The plaintiffs do not stand in that position.

These views dispose of the case. The plaintiffs must recover, if at all, upon the strength of their own title, and they have shown none.

The case of *Rockwell v. Brown* (54 N. Y., 210) is not in conflict with the conclusion we have reached. The court in that case held that the production of the assignment was *prima facie* proof that Rockwell had acquired the title of Paddock. In that case it did not appear that the insolvent proceedings were void. In this case that fact is admitted.

The judgment should be affirmed.



SUPREME COURT OF ILLINOIS.

STOCK NOTES OF INSOLVENT INSURANCE COMPANY.

LAMAR INSURANCE CO. v. MOORE.

Subscriptions make up the capital stock of such corporations, and constitute a trust fund for the benefit of the creditors. Stock notes of an insolvent insurance company can only be enforced, so far as necessary to indemnify creditors. The declaration should show the amount of such deficit.

1. Subscriptions—notes for—declaration.

BREESE, J.—In view of the averments in both counts of the plaintiff's declaration, we do not deem it necessary to determine the character of the instrument sued on, whether it be a negotiable promissory note due on demand, or otherwise. We are satisfied the organization of the corporation, and the subscrip-

Lamar Insurance Co. v. Moore.

tion by the defendant for five shares of the capital stock, created a liability on his part to pay to the company the amount of his subscription. Such subscriptions make up the capital stock of such companies, and is a trust fund for the security of the creditors of the company. The true question is, to what extent under the averments in the declaration can this liability be enforced, the corporation being insolvent, and its assets in the hands of a receiver?

Appellant's counsel insist it can be enforced to the extent of the undertaking. He says the company is an insolvent corporation, and that a receiver has been appointed; that this suit is for his use, and the proceeds are to be applied by him in payment of the debts of the corporation; that the note is an asset of the corporation, and again the defendant is a stockholder in the company—the note was given for capital stock and represented it—the capital stock is pledged to those who deal with the corporation for their security. The unpaid balance on stock notes are as subject to collection as any other debts due the company, and he asks why they should not be collected, and he creditors paid. The answer to all this is, such is not the contract defendant entered into. He engaged to pay the eighty per cent. of his subscription remaining unpaid, "on the call of the directors, as they might be instructed by a majority of the stockholders represented at any regular meeting."

This action is not brought by the receiver, but by the Lamar Insurance Co., the corporation with whom the defendant contracted, and before a recovery can be had, the plaintiff must show the required call was made. (*Barrett v. Alton & Sangamon R.R. Co.*, 13 Ill., 504.) When an insurance corporation becomes insolvent and its effects placed under the control of a receiver, stock notes are nothing more than instruments to be used in the same manner, and for the same purpose, as the capital stock could be used, and that would be as an indemnity, to be applied to the discharge of the liabilities of the corporation. A stockholder in a corporation so placed is not legally bound to pay more of his subscription than may be necessary to satisfy outstanding debts. Hence the necessity in an action to enforce

Lamar Insurance Co. v. Moore.

such a liability, that the amount of the debts should be averred and proved. Suppose this insolvent corporation owed two hundred dollars only, would it be right to recover of the defendant twice that amount, or half to be returned to him when the debt is paid, *waiving* expenses, commissions, and other deductions?

When we consider the nature of insurance corporations, we can well understand why subscriptions to their capital stock are made in the way this was made.

They differ from banking, railroad, and manufacturing companies, whose capital is necessarily invested in the active operation, in which such corporations are engaged. Not so with insurance companies. The capital stock of such corporations is not active, nor is it as a general thing used in their operations. Their contracts are contracts of indemnity, the premiums coming to them being so calculated and arranged as to meet its ordinary liabilities for losses. Stock in such companies is issued on the payment of a small per cent., as in this case, the balance being subject to call to meet its disasters.

This action is brought by the corporation for the use of the receiver. Why for his use? The answer is that he may be able to pay outstanding debts of the corporation. He can only demand so much of a stock subscriber as his subscription amounts to, and only so much of that as may discharge the debt.

In the absence of any averment in the declaration of the amount of debts due by this corporation, the plaintiff cannot recover. Burnham's judgment, and those of the other creditors who joined in the bill of complaint, may not have amounted to one hundred dollars. We cannot know, as it is not averred. The bill was filed to discover assets of the corporation, and apply them to the payment of those judgments. It is not averred that the capital stock had been absorbed, but only reduced and lessened. It follows, therefore, if the debts set out in the bill of complaint could be met and discharged by using the capital stock paid in, there was no necessity for any demand upon the defendant. Some allusion is made to the case of *White v.*

In re Weinboltz,

Smith (77 Ill., 354). In that case regular calls had been made by the board of directors.

We are of the opinion that on this action brought by the company, a recovery can be had, only on the terms of the subscription, and further that by the insolvency of the company, and the transfer of its assets to a receiver, a stock note, such as this, can be enforced only to the extent of the deficit, and that the declaration should show.

Judgment affirmed.

COMMON PLEAS—NEW YORK.

SPECIAL TERM, JULY, 1878.

In re The Accounting of WEINBOLTZ.

Upon a petition to discharge an assignee on final accounting under the general assignment act of 1877 (Laws N. Y., Chap. 466), it must appear that claims have been advertised for, and that citations have been issued to creditors and parties interested in the bond, and there must be proof of the due service thereof.

An original schedule of creditors is not evidence of the names and addresses of the creditors; it must appear by other evidence.

When a composition deed is relied upon, it must appear whether there are any creditors who have not signed it.

The testimony taken by a referee in such proceedings must be in writing, and subscribed by the witnesses, and returned to the court with the referee's report.

MOTION on petition to discharge assignee on final accounting

VAN HOESEN, J.—There are three classes of persons barred by the discharge of the assignee: First, creditors who have appeared; secondly, creditors who have been duly cited, but have failed to appear; and, thirdly, those who, after due advertisement, have not presented their claims. (Subd. 5, Sec. 20, Assignment Act of 1877.) It must appear on the accounting before the referee that the assignee duly advertised for claims (Sec. 4.) It was not the intention of the legislature that the assignee should administer the estate without notice to the

In re Weinboltz.

creditors. It must also appear that citations have been issued to creditors and parties interested in the fund (Sec. 11, 12, and 13), there must be proof that the citation has been duly served, and it is of course essential that the referee should know who the creditors are, for without such knowledge he cannot tell whether they have all been cited. The original schedule is not satisfactory evidence of this. The books of the assignor, the assignor himself, and the witnesses, may be examined to ascertain the names and addresses of the creditors. The referee should have taken testimony to ascertain whether there are any creditors who have not signed the composition. Again, there must be some authority given by the court to warrant the withdrawal by the assignee of the original papers, and for the substitution of copies in their stead. In this case, the assignee is the sole witness to the signatures of the creditors to the composition agreement and to the release. He goes before a notary public by himself, proves as subscribing witness the signatures of the creditors, of the genuineness of the signatures, and then without any other evidence than the certificate of the notary that he (the assignee) has sworn to them, he asks that his bond be discharged. It will be seen that the whole matter and the interest of the creditors hang on the mere word of a single person, and that person the assignee, who asks that his bond be cancelled and that he be released. He then offers what purports to be, and what probably is, a copy of the notary public's certificate, and proposes to leave that, together with a copy of the other papers, instead of the original, on the files of the court. This is too unsafe a method of doing business. The matter must be referred back to the referee to ascertain by the examination of witness who are creditors of the insolvent, and whether they have all signed the composition, whether there was any advertisement for claims, and whether the creditors were duly cited. The original composition agreement and the original release must be returned with the report of the referee. The testimony must be in writing, subscribed by the witnesses, and returned with the report. (Rule 30, General Rules.)

Baker v. Palmer.

SUPREME COURT OF ILLINOIS.

A plea of discharge under a foreign insolvency law must set out the law and must show that the order released the party pleading the same from liability for his debts.

BAKER v. PALMER.

This was an action of debt by Palmer against Baker, upon a judgment rendered by the Country Court of Hastings County, in the Dominion of Canada.

The following is a copy of the third plea referred to in the opinion :

“And for further plea in this behalf the defendant says *actio non*, because he says that before the date of the supposed judgment in the said declaration mentioned, and before the commencement of this suit, to wit, on, etc., the County Court of the County of Hastings, in the Dominion of Canada, granted to the defendant a discharge in bankruptcy, in the words and figures following, to wit :

“Insolvent Act of 1864. *In the matter of Wm. Baker, an insolvent.* In the County Court of Hastings :

“Upon reading the petition of William Baker, the above-named insolvent herein, and the affidavits and papers filed, and upon hearing the parties and evidence adduced, I do hereby make this my order, granting the discharge of the insolvent, the said William Baker, absolutely and unconditionally, and I do hereby grant the prayer of the said petition and the said insolvent is hereby discharged absolutely and unconditionally under said Act.

“Dated at Belleville this 14th day of November, A.D. 1868.

“J. H. SHERWOOD, J. C. H.”

“And the defendant further says that the several supposed causes of action in the said declaration mentioned are in re-

Baker v. Palmer.

spect of debts and claims, and each of them is in respect of a debt and claim by the said Insolvent Act of 1864, which defendant says is one of the laws of the Dominion of Canada in which the said county of Hastings is situated, made provable against the estate of the defendant, and which existed on the said 14th of November, A.D., 1868, and were within the jurisdiction of the said Dominion of Canada, and subject to the laws thereof, to which the said plaintiff owes allegiance; and that the supposed causes of action are not, or are any, nor is any one of them in respect of any such debts or debt as are or is by the said act excepted from the operation of a discharge in bankruptcy, and this the defendant is ready to verify," etc.

Henry V. Freeman, for appellant.

Waite & Clarke and *R. M. Dorman*, for appellee.

WALKER, J.—It is urged that the court below erred in sustaining defendant's demurrer to plaintiff's replication to his third plea to the plea itself. The plea is clearly bad.

It is an attempt to plead a discharge from the claim sued on in the Canada court. It is defective for several reasons. It does not show or aver that the order discharging defendant released or freed him from liability from this judgment or from any other debt. The order set out in the plea only discharges defendant absolutely and unconditionally under the Insolvent Act of 1864. The Act is not set out in the plea, and we cannot take notice of the terms of a foreign law. For aught we can know, the order may and probably did only discharge him from imprisonment for debt. The order fails to show, so far as it and the plea are concerned, that it was intended to release and discharge appellant from his debts, or any class thereof. The plea was entirely defective and the demurrer was properly sustained.

Judgment affirmed.

Mueller, etc., v. Dobschutz et al.

SUPREME COURT OF ILLINOIS, THIRD GRAND DIVISION.

OPINION FILED SEPTEMBER 30, 1878.

1. *Assignment for creditors and composition*.—Where an assignment is made for the benefit of creditors, and a composition agreement is signed by some of the creditors conditioned that all the creditors shall sign it, the release is not binding until all have signed.
2. *Preserving the liability of sureties*.—A creditor signing such an agreement can stipulate that the liability of sureties shall be retained, and it is sufficient if this stipulation is entered below the signature and is not in the body of the instrument.

SOLOMON MUELLER, Ex'r.; etc., v. MORITZ DOBSCHUTZ et al.

(The facts are sufficiently stated in the opinion.)

William Minkleman, for plaintiff in error.

C. W. and E. L. Thomas, for defendant in error.

Opinion by Mr. Justice SCHOFIELD.

This action was instituted by the appellant against the appellees to recover the amount claimed to be due on the following promissory note :

\$1,500.00.

BELLEVILLE, ILLS., FEBRUARY 20, 1874.

Two months after date we promise to pay to the order of George Mueller fifteen hundred dollars for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of ten per cent. per annum.

HENRY AHEND.

DOBSCHUTZ & AHEND.

FRED. E. SCHELL.

Appellees relied upon the defense that they were released from liability upon the note by the execution by the payee named in the note (the plaintiff's intestate) and others, of the following instruments :

Mueller, etc., v. Dobschutz et al.

“ Know all men by these presents that we, the undersigned creditors of Henry Ahend, in consideration of the execution and delivery of a certain deed of assignment, executed by said Henry Ahend and Mary E. his wife on the 7th day of August, A. D., 1874, to one Sebastian Fietsam as trustee, said deed of assignment being made of the property of said Ahend for the benefit of all his creditors, have hereby each of us for ourselves, our heirs, executors, successors, and administrators, remised, released, and forever quit-claimed, and by these presents do remise, release, and forever quit-claim, unto the said Henry Ahend, his heirs, executors, and administrators, all and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings, obligations, debts, dues, duties reckonings, accounts, sum and sums of money, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatever, both at law and equity or otherwise howsoever, which against him, me, or either of us, had, or now have, or which we or either of us can, shall, or may have, claim, challenge, or demand, for or by reason or means of any act, matter, cause, or thing, from the beginning of the world to the day of the date of these presents.

“ In witness whereof ” etc.

(Signed and sealed.)

[August 8, 1874.]

“ We, the undersigned creditors of Henry Ahend, hereby agree that if the said Ahend will make an assignment of all his real and personal estate of all kinds and characters whatsoever to an assignee for the benefit of all his creditors, we will accept from such assignee, each one, a *pro rata* share of the proceeds arising from said real estate and personal estate, when reduced to money, in full payment of our several claims against such Ahend.

“ It is hereby stipulated that in case this is not agreed to by all the said creditors and the said Ahend it shall not be binding upon us who shall have signed the same, and that the above-mentioned assignee shall be chosen by a majority of the

Mueller, etc., v. Dobschutz et al.

creditors, taking into consideration the amount due to such creditors as well as the numbers of the same.

“August 5, 1874.”

It was admitted by the parties to the suit that Dobschutz & Ahend and F. E. Schell, are the securities of Henry Ahend, and that they are the same persons that signed the two instruments read in evidence.

Plaintiff, in rebuttal, proved that one William Glass was a creditor of Henry Ahend at and before these instruments were signed, and that Glass and a few other creditors of said Henry Ahend never signed the instruments, but that creditors who did not sign got their *pro rata* share.

Evidence was also given tending to show that Dobschutz was present when Mueller signed the instrument. And it was proved that Mueller's name was signed by another, whom Mueller especially instructed that his signature was to be affixed only upon condition that it did not release the sureties upon the note.

The court at appellee's request instructed the jury as follows:

“The court instructs the jury, that a written release which releases one security will release all, and if the payee in the note in question signed a written release which does not in the body except the securities, and by that means released any of the securities, all will be released.

“The court instructs the jury, that if they believe from the evidence that this cause of action is upon a promissory note, and that defendants were securities upon the note, and that the payee released the principal on the note by a written release, then the release operated to release the securities, and the fact that payee added to his name the words ‘expressly understood that the securities are not released’ will not change the above rule.”

To the giving of the above instructions the plaintiff objected; objection overruled by the court, and the decision then and there excepted to by the plaintiff, and thereupon said instructions were read to the jury.

Mueller, etc., v. Dobschutz et al.

The jury returned a verdict in favor of appellees. Appellant moved for a new trial, which the court overruled, and rendered judgment upon the verdict.

The errors assigned, question these rulings of the court.

It is enough to say of the last agreement of release that it is upon the express condition that it shall not be binding unless assented to by all the creditors; and the evidence shows that it was not thus assented to. It is unimportant that some or all of the creditors not thus assenting have since received their *pro rata* part. It does not appear that they have ever assented to the terms of the release, or that they accepted the amount paid them in discharge of their claims against Ahend, and in the absence of such proof we perceive nothing to prevent their recovering judgment against him for the balances still due them respectively. What has been paid them was not paid pursuant to the terms of the release, but in disregard of its terms.

Appellant's signature to the first instrument is followed by these words: "Expressly understood that the securities are not released." We are of opinion that these words, though not appearing in the body of the instrument, are competent evidence of the condition upon which he was willing to become a party to it. (*Chitty on Bills*, 8th Am. Ed., 160; *Story on Promissory Notes*, Section 23; 2 *Parsons on Bills and Notes*, 539.)

Assuming the evidence to have been inadmissible, it is very clear that the sureties were not released, for an agreement which preserves the right of the creditor to proceed against the surety, or the right of the surety to proceed against the principal, will not discharge the surety. (*Rucker v. Robinson*, 38 Mo., 154; *Morse v. Huntington*, 40 Vermont, 468, 495; *Price v. Barker*, 4 Ellis and Blackburn, 760; 82 Eng. Com. Law, 760; *Kensley v. Cole*, 16 Meeson & Welsby, 128; *Veiley v. Hoag*, 24 Vt., 46; *Hubbell v. Carpenter*, 1 Selden, 171.)

It is impossible to point out how, by Mueller's subscribing the release upon the condition expressed, the sureties have been

In re Ransom.

prejudiced. They were left free to sue the principal, and there was nothing inhibiting him from doing so if it were material to preserve the liability of the sureties.

The court erred, therefore, in our opinion, in giving the instructions asked by appellee, and in overruling appellant's motion for a new trial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

COMMON PLEAS—NEW YORK.

SPECIAL TERM, JUNE, 1878.

There is no authority for an order or direction by the court to authorize or empower assignees under the General Assignment Act of 1877 (Laws N. Y., Chap. 466) to compromise claims due the assignee's estate at the discretion of the assignee.

Such an order would virtually annul the authority given by statute to the county judge to authorize the compromise or compounding of a claim, upon good and sufficient cause shown therefor.

The power of the county judge to allow a debt or claim to be compromised by an assignee which is due an insolvent debtor, relates to the circumstances of each particular case, and he cannot delegate such authority to another.

In re RANSOM.

DALY, C. J.—This is an application on the part of the assignee that he may be authorized to compromise all claims due to the assignors, with their advice, at his discretion. The petition set forth that a large portion of the assets of the assignee's estate consists of claims against persons in the Southern States; that these claims are about four hundred and sixty in number, and of various amounts, from two dollars to two thousand one hundred and fifty dollars; that sixty of them cannot, as the assignor believes, be collected in cash, for the reason, among others, that they are in suspense, and that the assignee has learned by long experience that delay in settling such debts—especially in the Southern States—usually ends in total loss.

There is no authority for an order of the court conferring

In re Ransom.

upon an assignee such a general power as this. Ordinarily the assignee of an insolvent estate has no general authority to compromise claims due to the estate, unless the power to do so is given by statute or by the assignment, or it is assented to by the creditors. (*Shepard v. Trowgood*, 1 T. & R., 380; *Hill on Trustees*, 344, 4th Amer. Ed.)

Before the enactment of the various statutes by which voluntary assignments for the benefit of creditors were brought under positive statute regulations, authority might be given in such instruments to the assignee to compromise such debts as in the exercise of a sound discretion were doubtful. (*Dow v. Platner*, 16 N. Y., 566; *Bellows v. Partridge*, 19 Barb., 178; *Brigham v. Tillinghast*, 15 Id., 618.) Now, however, the exercise of this power is regulated by statute, and is to be exercised only in the manner declared by statute. Provisions analogous to those enacted in the Revised Statutes in the various cases of assignees of insolvent debtors appointed under the Revised Statutes have recently been applied to the assignees in voluntary assignments for the benefit of creditors.

It was provided by the Revised Statutes (2 Rev. Stat., p. 42, Sections 7, 9), that the assignee of an insolvent debtor might, under the order of the officer appointing him, compound with any person indebted to the debtor. In such a case the judicial officer would have to have the facts of the particular case before him before he could make an order that the debt might be compounded and the debtor discharged, for there is clearly no authority to make a general order that the assignee might compound any of the claims against the estate which in his discretion he thought proper.

Power is given to the surrogate by the Act of 1847 to authorize an executor or administrator, upon good and sufficient cause shown, and upon such terms as the surrogate may approve, to compromise any debts or claim due to the estate (Laws of N. Y., 1847, Chap. 80, Sections 1, 2), which, even more distinctly than the previous statutory enactment, shows that the officer is to judge, upon the facts of the case, whether the particular debt should be compounded or not; and even

In re Ransom.

in this case the compromise is not beyond future inquiry, for the statute provides that the compromise, although made by the authority and with the approval of the surrogate, shall not prevent any person interested in the final settlement of the estate from showing that such debt or claim was fraudulently or negligently compromised or compounded, leaving the compromise, in fact, at least to this extent, at the risk of the executor or administrator. The power given to the county judge by the Assignment Act of 1877 (Laws of N. Y., 1877, Chap. 466, Sec. 23), to allow an assignee to compound a claim or debt is, in all its essential features, the same as the power given to the surrogate by the Act of 1847. Good and sufficient cause must be shown to the county judge, and the debt or claim is to be compromised or compounded on such terms as he may direct. It is evident from this, that the circumstances of the particular case are to be laid before him, and that he, and not the assignee, is to determine whether the debt should be compromised or not, as well as upon what terms; yet what in reality is asked in the order applied for is that the assignee shall, in this respect, be substituted for the judge; that he is to have the power of compromising any of the claims, and of deciding upon what terms. The order I am asked to make is in these words: "Ordered, that the said assignee be and hereby is authorized to compromise, in his discretion and upon the best terms that he can obtain, all claims due to the copartnership firm of W. A. Ransom & Co., and to receive in settlement thereof cash, notes, securities, or such available assets as he may deem best; provided that said assignor shall not compromise any claim that shall exceed in amount the sum of one thousand five hundred dollars, without making a special application to the court in reference thereto." This would be virtually annulling the statutory enactment that the county judge may, for good and sufficient cause shown, and on such terms as he may direct, authorize the assignee to compromise or compound any claim or debt belonging to the estate; for, under such a general order, it is not the judge but the assignee who decides in the case of any debt under one thousand five hun-

In re Ransom.

dred dollars, both as to the sufficiency of the cause for compromising it and as to the terms.

The assignee states that he has learned by long experience that delay in settling such debts as exist in this case, especially where they are in the Southern states, usually ends in total loss. This is probably true, but it would be no reason for ignoring the positive provisions of a statute. It does not, however, necessarily follow that great delay must ensue unless the assignee is clothed with this large discretionary power. Offers to compound debts usually come from the debtor when he is called upon for payment, accompanied by a declaration or representation of his inability to pay more in discharge of his obligation than the amount offered, and offers to compromise, where claims are disputed, are usually preceded by negotiations. If the assignee, who is here in New York, receives, in his efforts to collect the claims, a large number of offers to settle debts which he thinks should be promptly accepted, it is a very simple matter for him to go before the judge any day and give his reasons, which may be briefly expressed in a general affidavit, in respect to every debt sought to be compounded. It may involve a little trouble, but not more than usually attends the winding-up of insolvent estates by trustees who do their duty faithfully and carefully. It does not therefore follow that a delay in settling which may result in the total loss of these debts must ensue because the assignee has to get the sanction of the judge to the compounding of a considerable number of debts. The chief parties in interest are the creditors for whose benefit the assignment is made. They have had nothing to do with the choice of the assignee. He is selected by the insolvent, giving bonds for the due execution of his trust. If the court, by a general order of this kind, leaves the compounding of debts and the terms upon which they shall be compounded wholly to him, he may act judiciously or not, and the creditors are concluded, unless, upon the final accounting, they can establish that there was fraud or negligence on his part in compounding a debt (Section 23). It may, therefore, as a general rule, be quite as much to their

Brennan et al. v. Wilson et al.

interest that there should be the supervision of a judge in the compounding of any claim as that the compounding of claims should be left entirely to the judgment and discretion of the assignee. At all events, that is what the statute has provided for, and it cannot be disregarded. The application is consequently denied.

COURT OF APPEALS—NEW YORK.

OCTOBER TERM, 1877.

The failure of an assignee to give the security as required of him under the general assignment act of 1860, does not invalidate the assignment, but the title passes to him in trust, if he accepts the assignment, but he cannot act under it until security is filed on his behalf as required by the statute.

Where one of several assignees (all accepting the trust) fails to qualify by giving the security as required by the statute, he cannot join with the others and convey a good title to real property so assigned to them.

BRENNAN, Respt. et al., v. WILSON, et al., Applt.

THIS was an action to set aside an agreement to purchase land and to recover back a part of the purchase-money paid. It appeared that D. and M. made an assignment for the benefit of creditors (under the Act of 1860) to W., N. and T. The three assignees accepted the trust in writing. Two of them, W. and N., filed a bond as required by the statute, but T. did not join, and he refused to act as one of assignees. A subsequent assignment was made by D. and M., the original assignors, to W. and N. alone as assignees. A deed was tendered to plaintiffs, executed by the three assignees W., N. and T. and the assignors and their wives, which was refused by the plaintiffs, who brought this action.

On a trial before a referee he rendered judgment for defendants on the ground that the deed so tendered was properly executed. The General Term reversed this judgment and ordered a new trial. The defendants stipulated and appealed to this court.

Brennan et al. v. Wilson, et al.

ALLEN, J.—By the assignment of the 2d of July, 1875, and the acceptance of the trust by the defendants and Trimble, the assignees named therein, the property real and personal of the assignor vested in the assignees in trust for the creditors. The title did not remain in the assignor, nor was it in abeyance awaiting the giving of security by the assignees as required by statute, or the performance of any condition subsequent to the assignment. The creditors of the assignor acquired an interest in the assigned estate, and could enforce the execution of the trust. The statute, Chap. 348 of the Laws of 1860, regulating voluntary assignments for the benefit of creditors, does not make the giving of the statutory security by the assignees a condition precedent to the vesting of the estate in the trustees, nor does the failure to give the security within the time limited invalidate the transfer and restore the title of the assigned property to the assignor. This has been so held by this court, and by the Commission of Appeals. (*Thrasher v. Bentley*, 1 Abb. N. Cases, 39, 59 N. Y., 649; *Syracuse, etc., R.R. Co. v. Collins*, 1 Abb. N. Cases, 47, 57 N. Y., 641.) The question was considered by Judge Grover in *Juliard v. Rathbone* (39 N. Y., 375), but it was not necessary to decide it, as the judgment was necessarily as given whether the court held the one way or the other on the point now under consideration. The remarks of the learned judge upon that branch of the case did not necessarily embody the views of the court, and may be regarded as *obiter*, and the judgment as passing upon the other ground suggested by him. The three assignees having accepted the trust, the effect of the acceptance was conclusive, and they could not collectively or severally afterwards, by renunciation or disclaimer, throw off or repudiate the duties and responsibilities of the office, or divest themselves of the title once vested in them. (Hill on Trustees, 221, and cases cited in note (h); *Shepherd v. McEvers*, 4 J. C. R., 136; *Cruger v. Halliday*, 11 Paige, 314.)

Trimble, with the defendants, formally and in writing accepted the trust, agreeing faithfully to perform the same, and thus made himself a party to the deed. This was a deliberate

Brennan et al. v. Wilson et al.

and unequivocal act, perfecting the transaction, and making the transfer irrevocable. (Hill on Trustees, 219, and note (1).) Had Trimble disclaimed the trust by refusing to sign the written acceptance with the defendants, repudiating it when tendered, and doing no act in execution of the trust, or inconsistent with the disclaimer, no title to the estate would have vested in him, and the deed would not have taken effect. But having accepted, he could only be relieved of the trust and divested of the estate by the order of a court of competent jurisdiction, and this might have been done upon his resignation, or his removal from office for a non-compliance with the statute. (*Briggs v. Davis*, 20 N. Y., 15; S. C., 21 id., 574.)

A trustee having once accepted the trust in any manner, a purchaser cannot safely dispense with his concurrence in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have released his estate to his co-trustees. (*Crewe v. Picken*, 4 Ves., 97.) All the trustees must unite in a disposal of the trust property, and a deed by two, while a third is living, is not valid. The trustees take as joint tenants, and must all unite in the execution of the trust, and especially in a deed of lands. (Story Eq. Jur., Section 1280; *Brinckerhoff v. Wemple*, 1 Wend. R., 470; *Thatcher v. Candee*, 4 Abb. Ct. of App. Dec's, 387.) By the first assignment Duke and Moor, the assignors, were divested of all title, and nothing passed under the second assignment to the defendants alone, or by their deed to the plaintiffs. (*Marvine v. Smith*, 46 N. Y., 571.) The assignee, Trimble, did not at any time "enter into a bond," with or without securities, for the faithful discharge of his duties as assignee. The bond given was by the defendants, with sureties, for the performance by them of their duties. It was in no sense a bond of or for Trimble, and the sureties would not have been liable for his misfeasance or non-feasance in the execution of the trust. His name as principal, as well as one of the assignees for whose good conduct the sureties become sponsors, was erased from the bond, and upon oyer of the bond this would have appeared. The finding of the learned judge upon the trial, that the de-

Clark v. Stanton.

fendants on the 31st of July, 1875, executed on behalf of the three assignees a bond under the act with sureties, is against the evidence and inconsistent with the previous finding that Trimble had, on the 13th of July, renounced the trust and refused to act as one of the assignees.

Trimble was not a party to the sale to the plaintiffs, but did unite in the deed tendered them. This act was a nullity, as it was forbidden by law. Before giving the bond with sureties as required, and without giving such bond, he had no power or authority to sell, dispose of, or convert to the purposes of the trust any of the assigned property. This is expressly declared by Section 3 of the statute before quoted, and the prohibition is absolute and cannot be disregarded by him or by courts, and the *cestuis que trust* under the assignment, or trustees who may succeed him, may inquire into the validity and legality of his acts under the trust deed.

His trust was a dry trust, merely to take possession and hold the property until he should become qualified and have authority under the statute to dispose of it and convert it to the purposes of the trust. As he could not lawfully unite in the deed, it was in effect but the deed of the defendants, two of the three trustees, and did not make a title to the premises which the plaintiffs were bound to or could safely accept.

The order granting a new trial must be affirmed, and judgment absolute for the plaintiffs.

“All concur.”

SUPREME COURT OF MINNESOTA.

OCTOBER, 1877.

The jurisdiction over assignments for the benefit of creditors, and proceedings thereunder, granted by Chap. 44, General Laws, 1876, is vested in the several District Courts, to be exercised through the judges thereof as their organs. In exercising this jurisdiction, the court may remove an assignee for any misconduct in the administration of his trusts under the assignment which shows such removal to be necessary in order “to insure a faithful performance of the trusts, and a speedy close of the same

Clark v. Stanton.

by final decree of settlement and distribution." The petition authorized by Sec. 10 of the statute, showing a default of the assignee in not filing his report, may be made and filed by either of two assignors as a "person interested in the estate," within the meaning of that section. The investigation authorized by the statute is a summary one, to be conducted under the control and in the discretion of the court, to the end that it may acquire the requisite information to act advisedly in the exercise of it, supervisory jurisdiction over the assignment, and the proceeding thereunder; and whether the creditors become parties to it or not, any fact tending to give such information is a proper subject of inquiry.

It is not error to allow any of the creditors to become parties, and participate in such investigation, during any stage of the proceedings.

The utmost good faith and integrity are required of an assignee in trust in the administration of his trusts, and he will not be permitted to take any advantage of his position, or information as assignee, to make advantageous bargains for himself, to the prejudice of the trust estate, or any of his *cestui que trusts*; nor if he makes any such, will be allowed to retain the benefits of them.

In adjudicating upon the claims of an assignee, in final settlement of his accounts with the trust estate, no private agreement between him and either of his assignors is sufficient to authorize the allowance of a claim which would be unauthorized under the assignment.

Where, in an assignment by two persons as partners, it is provided that upon a fulfilment of the trusts, the residue, if any, of the property shall be reconveyed to the assignors, the jurisdiction of the court under this statute ends with the final decree, distributing the trust property or its proceeds, and directing a reconveyance of the residue according to the terms of the assignment, and it is not required of the court that it should determine the respective interests of the assignors in such residue, or making any apportionment thereof, between them. An appellant can only urge such objections to a judgment appealed from as affect his interests.

E. H. CLARK, Respondent, v. JUDSON A. STANTON, Appellant.

APPEAL from judgment and order of District Court, County of Stearns.

CORNELL, J.—It is contended by appellant that the jurisdiction over assignments for the benefit of creditors, and proceedings thereunder, which is given by Chap. 44, General Laws of 1876, is vested solely in the several judges of the District Courts of this State, and not in the courts themselves as such; that in using the expression, "Judge of the District Court," in designating by whom the powers conferred are to be exercised, the statute recognizes a distinction between the judge and the court, and indicates the former and not the latter as the depository of such powers. Hence it is claimed that the District Court can take no cognizance of any proceedings in-

Clark v. Stanton.

stituted under it; and inasmuch as the District Judge, in exercising the authority which it confers, acts solely as an officer, deriving all his powers from its provisions, he can only exercise such as are especially conferred. The statute is a remedial one, to be liberally construed with reference to its declared purpose, which is "to protect the creditors of assignors, and to regulate the duties of assignees."

By it every assignment or conveyance of the character indicated, together with the statement specified in Sec. 2 of the act, is required to be filed with the clerk of the District Court of the county wherein the debtor making it resides. The bond which the assignee is required to execute before entering upon his duties, must be approved by the judge of the District Court and filed with its clerk, and the court is authorized to grant leave to any creditor to prosecute the bond on a breach of any of its conditions, and to apply the proceeds in satisfaction of the debts.

Section 8 distinctly recognizes the fact that such filing of the assignment, bond, and inventory with the clerk is a filing in court. The processes which are authorized to be used in aid of the powers conferred, to wit, a citation, attachment, and summons, are such as appropriately belong to a court, to enable it to subject parties to its jurisdiction, and to enforce a performance of its judgment or orders.

The general power of supervision and control given over the proceedings, together with the authority to fully investigate the same, and to make any and all orders that may be proper and necessary to insure a faithful performance of the trusts created by the assignment, and a speedy close of the same by a final decree of distribution in accordance with the purposes of the assignment, necessarily involves the exercise of judicial power of such a nature as only a court having jurisdiction in equity as well as law can enjoy exercise.

Under our Constitution, District Courts are the only ones competent to take and exercise originally a jurisdiction of this character. To give effect, then, to the provisions of this statute in respect to all powers of this character which it assumes

Clark v. Stanton.

in terms to confer upon "the judge of the District Court," it must be presumed they were intended to be vested in the court itself, to be exercised by the judge as the authorized officer by and through whom its judicial functions are to be administered. That the proceedings herein, therefore, were commenced and prosecuted in the District Court, furnishes no ground for alleging error. The respondent petitioner was one of the parties who made the assignment. He was "a person interested in the estate," within the meaning of Section 10 of the statute, and a proper party to file the petition showing a default on the part of the assignee in not filing his report according to the provisions of that section. The petition showed such default, and was sufficient authority for the court to issue its citation to show cause to the assignee, and for the subsequent proceedings which were had, whereby his report was caused to be filed, and the investigation was instituted.

The object of the investigation as allowed by the statute was to obtain the requisite information to enable the court to act advisedly in making such orders as might be "necessary to insure a faithful performance of the trusts, and a speedy close of the same by final settlement and distribution of the estate." Its conduct was largely in the discretion of the court, as no particular mode of procedure is prescribed. Its scope was only limited to an inquiry into such facts as were pertinent and material to the purpose of the investigation, which was to inform the conscience of the court, so that its supervisory jurisdiction over the proceedings under the assignment might be properly and judiciously exercised. Within these limits it was in the discretion of the court to allow the examination to be carried to any extent irrespective of the specific charges contained in the petition, or the wishes of either the assignors or the creditors. It was immaterial, therefore, whether the co-assignor, William H. Clark, or any of the creditors, became parties to the investigation or not, as the legitimate scope of the examination was not thereby necessarily affected.

Then the ruling of the court in allowing some of the creditors to file replies to the report of the assignee in no way

Clark v. Stanton.

prejudiced him, as it opened no new field of inquiry, and it did not in the least change the character of the investigation, which it was the duty of the court to make, irrespective of such replies.

It was within its jurisdiction of its own motion, the appellant being properly before it, to make full inquiry into his conduct, dealings, and transactions as assignee, in order to ascertain the manner in which the trusts were being performed, and whether he was a suitable person to be longer continued in their administration.

Evidence tending to show bad faith on the part of the assignee towards his *cestui que trusts*, that he purchased of them demands against the trust estate at a large discount for his own benefit; that, in making such purchases he concealed from them the actual value and condition of the trust property, and misrepresented the purpose and effect of the assignment which he procured, was clearly competent upon the question of his integrity and fitness as assignee. None of the evidence received in this case seems to us open to any valid objection, as being beyond the legitimate scope of the examination. The permission which was given to the creditors to file replies to the report of the assignee, and to take part in the proceedings was, in our judgment, a proper exercise of discretion under the circumstances.

The allegation therein contained, if true, tended strongly to impeach the honesty and integrity of appellant as assignee, and the validity of the assignments which he obtained from the creditors upon the settlement and transfer of their claims against the estate. Under these circumstances it was proper to give them a hearing, for if the facts therein alleged were proved, and invalidity of the settlement and transfer established as to any of the creditors, such creditors would have a right to be consulted in the future management and disposition of the trust estate, as still having an interest therein.

The fact that appellant had transferred the demands which he had so purchased, did not preclude the court, in the adjustment of his claims and account as assignee, from examining the

Clark v. Stanton.

character of such purchases and assignments and adjudicating upon their validity as between him as assignee and the estate.

That the assigned property was ample, under proper management, to fully satisfy and discharge all indebtedness against it, together with the expenses of executing the trusts, and leave a surplus for the assignors; that the administration of such trusts were being unnecessarily and unreasonably delayed; that the assignee had misused his position and knowledge as trustee to speculate in claims against the estate for his own benefit, and had improperly employed a portion of the trust funds for that purpose; that in purchasing such claims, he grossly violated his duties and obligations as trustee, by concealing from the creditors correct knowledge of the value and condition of the trust estate, and thereby, and by misrepresentations induced a belief in its insolvency, and secured to himself advantageous bargains and transfers, under the false pretence and impression that the estate alone was to receive the benefit of the transactions, instead of himself, are facts fully established by the evidence and findings, and constituted sufficient grounds for his removal, if the court possessed the power, and for a full settlement and adjustment of his accounts and dealings with the estate as assignee. That this power of removal for adequate cause, is vested in the District Court, as a court of equity, and may be exercised in a proper action brought for that purpose, is undoubted. (*Goucelier v. Foret et al.*, Minor, 13; Secs. 26 and 27, Ch. 33, General Statutes.) No good reason is perceived why it may not also be exercised, in proceedings under the statute in question, whenever it becomes necessary, in order "to insure a performance of the trust, and a speedy close of the same by final decree of settlement and distribution."

During the administration of his trust, the assignee bought claims against his assignors, amounting to ten thousand one hundred and sixty-three dollars and twenty-eight cents, for the sum of six thousand one hundred and sixty dollars and twenty-four cents, and took assignments thereof from the creditors, in

Clark v. Stanton.

his own name. In making these purchases, he advanced of his own funds two thousand five hundred and forty-two dollars, the balance being taken out of moneys belonging to the trust estate. In the settlement of his account as assignee, the court credited him with the amount of his advances and interest during the time the estate had the benefit of them, but disallowed his claim to be treated as a creditor of the estate, in respect to such demands, and to be paid their full par value and interest.

The utmost honesty, integrity, and good faith are required of an assignee in trust, in all his dealings with the trust property and his "*cestui que trusts*." He is held to a strict accountability for any act of negligence or abuse committed in the administration of his trusts, and for any misappropriation of trust funds to purposes unauthorized by the instrument of assignment.

The fiduciary character of his position precludes him from taking any advantage of his influence as assignee, or for any information acquired while acting in that capacity, for purposes of personal gain or profit. Every agreement, having such an object, made with his assignors or with any of their creditors, especially if not communicated to and approved by all, is looked upon by the courts with great suspicion and distrust, and, if tainted with the slightest evidence of fraud, concealment, or misconduct, on the part of the assignee, in its procurement, will be set aside as inequitable and unjust, and he will not be permitted to reap any personal advantage therefrom. These are general principles too well settled to require the citation of authorities. (Perry, on Trusts, Secs. 209 and 427 to 430.) Upon the findings and the evidence herein, it is evident that the bankruptcy proceedings which were threatened and instituted by a portion of the creditors were caused by the misconduct and culpable delay of the assignee in the execution of his trusts, and the apprehension of loss to the trust estate, thereby reasonably excited. If, therefore, it was necessary to purchase the claims of these creditors, to stop these proceedings, it was owing to the fault of the assignee. As to all the

Ciark v. Stanton.

purchases made and discounts obtained, the creditors acted under like apprehension of loss, occasioned by the misconduct of the assignee, in studiously concealing from them the real condition and value of the trust property, procrastinating a settlement of the estate, and in most, if not all the cases, inducing them to believe that all compromises effected would enure solely to the benefit of the estate.

Neither did he inform them of the existence of any arrangement or understanding between him and either of the assignors, whereby he was to derive only personal benefit to himself from such purchases.

Under these circumstances, the court was clearly right in disallowing his claims, especially in view of the written protests against it, on the part of the defrauded creditors. Though both assignors had joined in asking its allowance, it ought not to have effected the result. It was unnecessary to consider the validity, as between themselves, of the alleged written agreement between the assignee and his assignors, in order rightly to adjudicate upon the claims and accounts of the former, under the assignment, for such adjudication depended wholly upon the terms of the assignment, which neither could modify the doings of the assignee under it, and those equitable principles which are applicable in such cases.

The proper adjudication of this question did not require the court to determine how much and what portion, if any, of the trust estate would remain after the fulfilment of the trust, to be reconveyed to the assignors, and ascertain their respective interests therein, and make appointment accordingly.

Its entire jurisdiction in these proceedings was to see that the trusts created by the assignment were fulfilled by satisfying the expenses incurred thereunder, the debts fastened upon the trust estate, and restoring the residue of the property, if any, to the authors of the trusts.

The appellant assignee is the only party bringing this appeal. He can only be heard, to urge such objections to the judgment as affect his interests alone. The only respect in which he is affected by it is in his removal as assignee, and in

Kingman v. Barton.

the adjustment of his accounts and claims as such assignee against the estate.

Whether the creditors or assignors are properly protected by it or not, in their respective interests under the assignment, is a matter of no concern to him, and cannot be considered on this appeal.

The judgment is affirmed.

SUPREME COURT OF MINNESOTA.

DECEMBER, 1877.

Under the Act of March 4, 1875, entitled "An Act to protect the creditors of assignees and to regulate the duties of assignees," the requirement in Section 3 that the assignees shall, within five days after the filing of the inventory by the assignor, file a bond conditioned as therein provided, is imperative, and if he fails to file the bond within the time, his interest in property assigned ceases.

A. F. KINGMAN, Respondent, v. ASA BARTON, Sheriff of the County of Rice, Appellant.

APPEAL from a judgment of the District Court for the County of Rice.

GILFILLAN, C. J.—One Humre made, acknowledged, and on August 14, 1876, filed in the office of the Clerk of the District Court, in the County of Rice, an assignment of his property to plaintiff in trust for the benefit of creditors. On the 21st he filed the inventory required by the Act of 1876; on the 30th the bond of the assignee required by the act was approved by the judge of the court, and on September 4th was filed in the office of the clerk, and the plaintiff took possession of the property. After this the defendant, as Sheriff of Rice County, took the property from plaintiff under an attachment and execution against Humre. Whereupon plaintiff brought this action in replevin and had judgment below, and defendant appeals.

Kingman v. Barton.

Subd. 6 of Section 2 of the act referred to, p. 62, Laws of 1876, provides that within ten days after filing the assignment, the assignor shall file with the clerk "a full, true and complete inventory of such debtor or debtors' estate both real and personal, in law or in equity, and the incumbrance existing thereon, and of all vouchers and securities relating thereto, and the value of such estate and such item thereto, to the best knowledge, information and belief of such debtor or debtors." This inventory is to be under the debtor's oath.

Section 3, that "before any such assignee or assignees shall have power to take possession of any such estate so assigned, or any part thereof, or shall have any authority to sell, dispose of, or convert to the purposes of the trust, any part of such estate, and within five days after the filing of the inventory" such assignee or "assignees" shall execute and file with the clerk a bond, with sureties approved by the judge of the District Court, in amount at least double the value of the estate assigned, and conditioned on the faithful and just performance of all the duties of such assignee or assignees.

Section 6 subjects all the proceedings to the order and supervision of the District Court. The proceeding is in the nature of a judicial proceeding. (*Clark v. Stanton*, MSS., 2 N. W. Rept., 28, and ante, p. 61.)

We think the absolute title to the property assigned does not rest in the assignee until the bond required by Section 3 is filed. Until then it is inchoate or conditional, depending for its continuing upon his filing the bond; but between the filing of the assignment and the filing of the bond, the court would undoubtedly protect the inchoate or conditional title to the property, not only as against acts of creditors and third persons, but of the assignor. The intent of the legislator, unequivocally expressed, that the assignee shall have no power over the property until the bond is filed, goes far to show that it must be filed within five days.

For the filing of the assignment suspends the power of the assignor for the time, to further dispose of the property, and of the creditors to proceed against it for satisfaction of their

Kingman v. Barton.

debts without vesting in assignee, until he files the bond, the power to dispose of, or even taking possession of the property. It is hardly to be supposed that the Legislature intended this anomalous condition of things, perhaps temporarily necessary, but nevertheless hurtful both to the assignor and the creditors, to be of long or indefinite continuance. On the contrary, we must think that the time is inserted as a limit to the continuance of such conditions, and therefore that the assignee, to perfect his title, must file the bond within the time. Further, the proceeding is in the nature of a judicial proceeding. By the filing of the assignment, the court gets jurisdiction over the assignor and probably over the property; but it gets none over the assignee until he files his bond.

That is in the nature of an acceptance of the trust, and an appearance in and submission to the jurisdiction of the court for the purposes of the trust by the assignee. That the provision as to the time within which he shall accept the trust and submit to the jurisdiction is merely directory and may be complied with or not, as the assignee shall please, without affecting his rights, is not credible. The rule of construction, that the time prescribed for the performance of official acts, in the performance of which the public or third persons have an interest, shall, unless the doing of the act after the time is prohibited, be held merely directory, applies to cases where the public or third persons will be prejudiced by holding the act to be invalid if done after the time, and is for the protection of parties interested from suffering through the neglect of public officers. It has no application to a case like this, where it is better for parties whose interest the statute aims to protect, that a failure to do the act within the time shall be held to terminate the right to do it at all. (*Juliand v. Rathebone*, 39 N. Y., 369.)

Where, therefore, the assignee fails to file the bond within the time prescribed by the act, it is equivalent to a refusal to accept the trust, and it terminates all right in the property which he may acquire upon the filing of the assignment.

Judgment reversed.

Paine v. Lester.

SUPREME COURT OF ERRORS—CONNECTICUT.

DECEMBER, 1876.

Where a corporation located in one State (Pennsylvania) had gone into insolvency, and made an assignment under those laws and given notice to a debtor thereto residing in another State (Connecticut), a creditor in the latter State may afterwards attach and acquire a valid lien upon said debt as against the trustee in insolvency.

It does not affect the question if such attaching creditor is a non-resident of the State (Connecticut) whose courts he comes into and invokes the aid of the laws thereof; he is entitled to it the same as a citizen of the *lex fori*.

PAINÉ, Pltff. in Error, v. LESTER, Deft. in Error.

GRANGER, J.—Paine, the present plaintiff, on the 7th of July, 1875, brought an action of assumpsit against the German Insurance Company, and factorized Lester, the present defendant, as agent and debtor of the company. The insurance company was a corporation organized under the laws of the State of Pennsylvania, and located in that State.

The company appeared in the action and made defense, and judgment was rendered against. Execution was issued on the judgment and demand made upon Lester for payment, but he refused to satisfy the same, and the present action of *scire facias* was brought. It is not denied by the defendant that he was indebted to the insurance company at the time of the attachment in a larger amount than the judgment recovered. But he claims that the fact is found by the court that in September, 1874, the insurance company went into insolvency under the Insolvent Laws of the State of Pennsylvania, making an assignment of all its effects to one Eichenlaub, in trust for its creditors, and that, on the 31st of May, 1875, written notice of the assignment was given to Lester, so that it could not be taken by the later attachment of the present plaintiff.

It is a general principle that personal property, having no situs, is subject to the law of the owner's domicil, and can be transferred by voluntary assignment or sale made by him

Paine v. Lester.

according to the law of his domicile. This well-settled principle the courts of England have applied to transfers of personal property made by decrees of foreign courts, and to cases of succession to such property by will or intestacy under foreign laws, or by foreign bankruptcy proceedings. (*Potter v. Brown*, 5 East., 131.) Judge Story, in reviewing the English decisions, which have not been in entire harmony on the point, comes to the conclusion that they sustain this broad application of the principle, and that the mode of transfer is immaterial, the only question being whether it is good by the law of the owner's domicile. (Story's *Conflict of Law*, Sec. 404 *et seq.*) Chancellor Kent came to the same conclusion, after elaborately reviewing the English authorities, in the case of *Holmes v. Remsen* (4 Johns. Ch. R., 460), and regarded the rule as thus established as founded on legal principles, and the only reasonable one. He says (p. 484): "I entertain no doubt that the same rule is known and observed among the other nations of Europe. It is embraced by the general principle, so universally acknowledged by the civilians, that the distribution and disposition of personal property are governed by the law of the owner's domicile." But neither the current of English decisions, nor the high authority of Chancellor Kent, in the elaborate and learned opinion which we have referred to, seems to have made a permanent impression upon the jurisprudence of this country, and the weight of American authorities is in favor of a much more restricted application of the rule that personal property follows the law of the owner's domicile. While fully admitting this general principle, the American cases, instead of starting from it in entering upon the discussion, start from another equally well-settled principle, that the laws of a State or country have no legal effect beyond the limits of its territory. This being so, they regard the giving effect to the laws of a sister State or foreign country, in the case of the transfer of or succession to personal property within their own limits, as wholly an act of comity, and not a recognition of a right. This comity they are prepared to extend where there is no reason to the contrary, especially if there is no interest of their own citizens or of the

Paine v. Lester.

citizens of a sister State who are seeking to avail themselves of the protection of their laws to be injuriously affected by such recognition. (Story's Conflict of Laws, Sec. 414; *Upton v. Hubbard*, 28 Conn., 274; *Fox v. Adams*, 5 Greenl., 245; *Ingraham v. Geyer*, 13 Mass., 146; *King v. Johnson*, 5 Harring., 31; *Hoyt v. Thompson*, 19 New York, 207; *Willitts v. Waite*, 25 New York, 587; *Kelly v. Crapo*, 45 New York, 86; *Dunlop v. Rogers*, 47 New Hamp., 281; *The Watchman*, Ware, 232; *Milne v. Moreton*, 6 Binney, 361, 365.

The remarks of the court in the case last cited are specially noteworthy, as coming from the State of Pennsylvania, the effect of whose insolvent proceedings is in question in this case. The court says (per Yeates, J., 353): "It is one thing to assert that assignees of bankrupts under foreign institutions should be allowed by the courtesy of nations to support suits as representatives of such bankrupts for debts due to them, and another to give efficacy to those institutions to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owe allegiance, and from which they are entitled to protection. The right of such assignees thus to sue in a foreign country does not result from the force or effect of the law, but from long-used and well-established comity."

The title of a foreign assignee or trustee in insolvency, depending for its recognition here solely on our comity, that comity will not be shown where there is any good reason against it, and the debt due from Lester to the German Insurance Company, and the right to which in the assignee we are asked to recognize, has been attached by the plaintiff, and all the necessary steps taken under our laws for its appropriation to the indebtedness of the insurance company to the plaintiff. It is of no consequence that the attachment was not made until after the assignment in insolvency, and after notice of the assignment had been given to Lester, for the right of the plaintiff is not the right of a prior attaching creditor, but the right of a creditor asserting his claims against the opposing claim of the assignee in insolvency, the one resting on legal

Paine v. Lester.

proceedings authorized by our laws, and the other only on a comity which we can exercise or refuse to exercise at our discretion. In those circumstances the court owes a legal duty to the plaintiff which is far more imperative than the demands of mere hospitality to a stranger.

In this case the plaintiff is a citizen of Rhode Island, but that fact does not affect the case. (*Upton v. Hubbard*, 28 Conn., 275.) The citizens of all our sister States have by the Constitution of the United States the same privileges with our own citizens, and any one of them who has availed himself of legal remedies furnished by our laws, to secure payment of a debt due him, has the same claim to the assistance of our courts that one of our own citizens would have.

It does not appear very clearly by the finding whether the assignment was made by the insurance company in the first instance, and as an ordinary assignment for the benefit of creditors, or as a part of certain insolvent proceedings commenced by petition, in course of which the petitioning creditor is required by the statute to execute an assignment of all his property to certain trustees appointed by his creditors at a meeting called by the Insolvent Court for that purpose. It is found only that the assignment was made "under the Insolvent Laws of the State of Pennsylvania."

It was, however, stated in the argument, and seemed to be agreed, that the assignment was made under the twenty-second section of the act with regard to "Insolvents," which is a different statute and in a different part of the statute book from that which regulates assignments for the benefit of creditors, (1 Brightly's Purdon's Digest of Penn. Statutes, pages 90 and 775.) Whatever, therefore, might be said with regard to a voluntary assignment for the benefit of creditors, and the present assignment must be regarded as clearly a statutory and not a common law conveyance, and therefore as having no strictly legal effect beyond the limits of the operation of the laws of the State.

For the reasons which we have given, we think the right of the plaintiff must prevail over the claim of the assignee of the

In re Moore.

insurance company, and advise that judgment be rendered in his favor.

In this opinion the other judges concurred, except Park, C. J., who dissented.

N. Y. COMMON PLEAS.

SPECIAL TERM, JULY, 1872.*

*In the matter of the application of WILLIAM MOORE,
an imprisoned debtor, for a discharge from imprisonment.*

On a petition to be discharged from imprisonment in civil causes, pursuant to article sixth of N. Y. Revised Statutes, p. 31, the petition is properly addressed to the court, and not to the officer before whom it is to be made.

In such proceeding the petition should show the cause of the imprisonment. The petition and an account of the property of the applicant must be served as required by the statute.

A person who is at large on the jail limits may make the application, for he is regarded as being in "actual custody" in the meaning of the statute.

THE application was under article six of title one of chapter 5 of part 2 of N. Y. Revised Statutes (2 R. S., 31), entitled "of voluntary assignments by a debtor imprisoned in execution in civil causes." The remaining other facts sufficiently appear in the opinion.

ROBINSON, J.—The first objection to the application, because it is addressed to this court, is overruled. See 2 Revised Statutes, 31, Section 1. The provision of the sixth article differ from several previous ones in which the application must be made to some officer. In such a case as the present it must be made to "the court from which the process issued," as was done in this case.

As to the second objection that the petitioner does not "set

* Not before published.

In re Moore.

forth the cause of the imprisonment," as required by 2 Revised Statutes, 31, Section 4, is well taken. The mere statement that the petitioner is imprisoned on an execution against his person is merely of his being one of the persons to whom the statute generally affords relief, but the statement of the cause of such imprisonment, upon which he was liable to such arrest in the action, is not disclosed. This is a fatal objection, as it is expressly required to be done. The mere fact that the petitioner is arrested on execution does not disclose any of the various causes for which he may be liable to such process against his person.

As to the third objection the statute also requires service of a copy of the petition and account of his estate. The petition refers to the sheriff's certificate as to the process upon which he is imprisoned and the basis of any qualification in the petitioner's absolute statement. Such reference constituted the certificate part of the petition, as for error in the allegation he would be relieved from imputation of false meaning in that respect, by thus fairly presenting it as the basis of his representation.

The copy petition served was (if fact be so) incomplete. Petitioner's counsel have only demurred to the sufficiency of the objection. No proof offered.

As to the fourth objection, that petitioner is out of prison on the jail limits on bail, and not actually imprisoned, is not tenable. *Cowan v. Stokes*, 26 How., 84, is an authority on this point.

For defect in the petition of a statement of the cause of the imprisonment, and on matter of form, the proceedings must be dismissed.

In re Currier.

NEW YORK COMMON PLEAS.

SPECIAL TERM, SEPTEMBER, 1878.

In re assignment of JOHN A. CURRIER.

There is no authority for allowing costs and counsel fees, in proceedings under the General Assignment Act, to parties other than the assignee, payable out of the assigned estate.

The statute intends that the power to award costs and counsel fees shall be confined to cases of disputed claims as between the contestants.

The intention of the statute is to prevent any waste of the funds in the assignee's hands by the encouragement of litigation.

On this application for the final accounting of the assignee, nine counsel appeared, and at the end each asked an allowance out of the fund. The court allowed none but those to the assignee's counsel, and delivered the following opinion :

J. F. DALY, J.—There is no authority for allowing costs and counsel fees, in proceedings under the General Assignment Acts (Laws of 1877, Chap. 466, Sec. 26 ; Laws of 1878, Chap. 318, Sec. 26), to parties other than the assignee, payable out of the assigned estate. Whatever may have been the power of the court or judge prior to the amendments of the act above cited, the latter leaves no doubt on the subject. They contain (Sec. 26) an express enactment as to counsel fees and costs. The enactment is connected with the authority vested in the court to order a trial, before a referee or by a jury, of any disputed claim or matter arising under the provisions of the act, and further provides that the court may, in its discretion, award reasonable counsel fees and costs, and determine which party shall pay the same. The statute plainly intends the power to award costs and counsel fees shall be confined to cases of disputed claims and matters, and that the party to the dispute who has unsuccessfully prosecuted or defended shall pay his adversary reasonable costs and counsel fees. This provision adequately protects all parties.

The Legislature evidently appreciated the danger of en-
VOL. I.—7

In re Currier.

couraging litigation in assignment cases, and has prevented any waste of the funds in the assignee's hands by such means. The creditors of each estate are numerous, and reasonable pretexts are not wanting for each to employ counsel, a moderate allowance to whom would in nearly every case absorb all the fund. If a creditor wishes his interest protected and employs counsel for the purpose, he must expect to pay for the service out of his own pocket and not to charge the shares of all the other creditors with the expense. It may be said that the exertions of a single creditor will, by cutting off improper claims of other pretended creditors, or by sifting the assignee's accounts, materially swell the fund, which should then pay for the common benefit. But the statute gives the court power to inflict costs and counsel fees on defeated claimants and assignees in such cases, which costs and counsel fees will indemnify the creditor exerting himself in the way suggested. If upon the accounting of the assignee it should appear that the latter has contested unjustly, creditors who have succeeded in cutting down his charges or increasing the sum with which he is chargeable, may have costs against him personally, but not against the fund. There would be no protection against the obstinacy or fraud of the assignee if the fund, and not he, paid the expense of bringing him to terms; and it is easy to see that if the costs of all the litigations that might arise in connection with these insolvent assignments were chargeable upon the fund, litigation of one form or another would not cease until the fund was exhausted.

There is no authority, therefore, for the allowances out of the fund asked for by the nine counsel who have appeared on this accounting. The creditor who instituted the proceeding to compel the assignee to account cannot have costs because the assignee responded promptly. Nor are the other creditors entitled to bills of costs against him, as he has not impeded their investigation into his accounts, nor been convicted of any improper conduct.

The counsel fees paid by the assignee to his own counsel in protecting the assignment and the fund seem to be proper.

In re Lewenthal et al.

They are, however, large enough to cover the expenses of this accounting, and no other allowance should be made.

The assignee's counsel and the several counsel for creditors entered into a stipulation to allow the referee to whom the accounts were referred, a certain rate of compensation. This stipulation is not binding on the court, as the case does not fall within the provisions of Sec. 313 of the Code, which refers to civil actions only. I do not regard as reasonable a greater allowance than three dollars for each adjournment and five dollars for each sitting in an ordinary reference to pass an assignee's account. The disbursement for referee's fees must be confined to an allowance on that basis.

The decree should be drawn accordingly.

NEW YORK COMMON PLEAS.

SPECIAL TERM, OCTOBER, 1878.

An assignee, under the General Assignment Acts, will not be discharged by the court except upon a proceeding for an accounting.

All persons, whether they have signed releases or not, must be notified by citation to attend the settlement of the accounts of the assignee.

Where the assignors and the creditors have compromised, and the assignee seeks to be discharged, he must first advertise for claims as provided by statute.

In re Assignment of LEWENTHAL et als.

APPLICATION to discharge assignee under the General Assignment Acts.

J. F. DALY, J.—No discharge will be granted the assignee except upon a proceeding for an accounting to be instituted by citation. The statute is clear upon this point. The assignee must apply by petition for a citation to all persons interested in the estate to attend the settlement of his accounts, and all parties, whether they have signed releases or not, must be notified. Advertisement for claims must be made where the assignee seeks relief by reason of a compromise between the assignor and the creditors.

In re Fitzgerald.

COMMON PLEAS—NEW YORK.

SPECIAL TERM—DECIDED DECEMBER, 1878.

A person imprisoned upon an execution issued against him on a judgment in a civil action will not be discharged from such imprisonment under article 6, title 1, chapter 5, part 2, Revised Statutes, where it appears that a few days after his arrest he was adjudged a bankrupt under the United States laws on his own petition.

A party cannot put it out of his power to obey a court, and then ask that court to relieve him.

When it appears that without any act or fault on the part of the imprisoned debtor, and against his will, that all the property which he had at the time of his arrest had been taken from him, the court will not refuse his discharge.

In the Matter of DANIEL H. FITZGERALD, an imprisoned debtor.

APPLICATION to be discharged under N. Y. Revised Statutes, "Fourteen Day Act."

VAN HOESSEN, J.—Fitzgerald was arrested on the 21st day of August, 1878, upon an execution against his person, issued on a judgment against him, recovered by H. K. & F. B. Thurber. On the thirtieth day of August he was adjudicated a bankrupt, on his own petition, and on the eighth day of November last he presented to this court a petition praying for his discharge, under article 6, title 1, chapter 5, part 2, Revised Statutes. His application for the discharge is opposed by the Thurbers, who insist that as he has made an assignment to the assignee in bankruptcy of all the non-exempt property he had at the time of his arrest, he cannot possibly comply with the State law, which requires that, in order to be discharged from arrest, he shall assign that very property for their exclusive benefit. Under the State law the Thurbers, who caused his arrest in their action, are entitled to be paid in full out of his property, if there be sufficient for that purpose; but, since he made his assignment in bankruptcy, he has no property which he can turn over to any assignee appointed by this court.

In re Fitzgerald.

It is idle, therefore, for him to ask from a State court relief which it has no power to give, except upon his making an assignment of property which has passed irrevocably beyond his control. It is true that if it should appear that, without any fault on his part, and against his will, all the property, which he had at the time of his arrest, had been taken away from him whilst imprisoned, the court would not refuse him a discharge. But he is in no such situation. His property was assigned by him of his own free will, with a view to his own personal advantage. It was assigned in a lawful manner, and in conformity with the Bankruptcy Act; but, by his going into bankruptcy, there was an election on his part to get the benefit of a discharge from his debts in bankruptcy, instead of a discharge from imprisonment in the action between himself and the Thurbers. Having made that election, he can only get such relief as the Bankruptcy courts can afford him. He cannot put it out of his power to obey the orders of the State court, and then ask that court to discharge him from imprisonment. It is his own act that has made it impossible for him to execute an assignment that will be anything more than a nugatory formality. In *Dinkerhoff v. Ahlborn* (2 *Abbott's New Cases*, p. 73), Ahlborn, an imprisoned judgment debtor, who, after his arrest under an execution from a State court, was adjudicated a bankrupt, found it necessary to obtain from the United States Court an order annulling the adjudication of bankruptcy, for the purpose of obtaining his discharge from imprisonment. The same course is open to Fitzgerald, though he is, of course, at liberty to continue his proceedings in bankruptcy, and to obtain such relief as a discharge in bankruptcy will afford him. The case of *Maas v. O'Brien* (14 Hun., 95), goes far to support the position that the State court should not entertain such proceedings as these, after an imprisoned debtor has resorted to the United States Courts. There is an irreconcilable conflict between the Federal system of bankruptcy and the State insolvent laws, and the latter are compelled to yield. Where the Federal courts lay their hands upon the property of an insolvent, it is impossible for the State courts to carry the

In re Brady.

insolvent laws into execution. It is folly for a State court to attempt to execute a part of the provisions of the State statutes, after a limited States court has taken under its exclusive control the insolvent's estate, and thus prevented the carrying out of other provisions of the statute which are essential to the completeness of the system. The views I have expressed are not novel. They are in full accord with the decision in *The People ex rel. Gilsten v. Brooks* (40 How. Pr., 165).

The application for a discharge is denied.

N. Y. COURT OF APPEALS.

DECIDED APRIL, 1877.

When a judgment debtor who has disposed of his property with the intent to defraud his creditors and is imprisoned on an execution at the instance of the creditor, whom he has defrauded, he is not entitled to be discharged from such imprisonment by making a voluntary assignment under the statute.

It need not appear that the fraudulent disposition was made in contemplation of applying to be discharged; it will be sufficient to defeat such discharge, although made before the commencement of the action in which the execution was issued.

But it must appear to have been made with the intent to defraud creditors existing at the time of the disposition of the property.

In the matter of WALTER BRADY, Appellant, an imprisoned debtor.

APPEAL from an order denying the discharge of the debtor.

J. Langdon Ward, for appellant.

Geo. W. Van Slyck, for respt.

EARL, J.—The debtor was arrested in two actions upon orders of arrest issued because he had disposed of his property with intent to defraud his creditors. Judgment having been obtained in the actions he was arrested and imprisoned by virtue of executions issued thereon. He applied for his discharge

In re Brady.

as an imprisoned debtor under Part 2, Chap. 5, Tit. 1, Art. 6, of the Revised Statutes. This was opposed by the judgment creditors, who by the affidavits upon which the orders of arrest were issued and upon other proof established the fraudulent disposition of his property by the debtor. By Art. 6, an imprisoned debtor desiring a discharge from imprisonment is required to present a petition to the court praying for his discharge, setting forth the matters specified in Section 4. He must swear to the following affidavit as prescribed in Section 5 to be indorsed upon his petition: I, the within named petitioner, do swear that the within petition and account of my estate and of the charges thereon are in all respects just and true, and that I have not at any time or in any manner disposed of or made over any part of my property with a view to the future benefit of myself or of my family, or with an intent to injure or defraud any of my creditors. If upon the hearing the court shall be satisfied that the petition and account of the applicant are correct and that his proceedings are just and fair, the discharge must be granted.

The affidavit is part of the proceeding, and that cannot be just and fair unless it is true. It is important therefor to ascertain the scope and meaning of the affidavit.

It is not complained in this case that the petition and account of his estate and of the charges thereon were not just and true.

It is not shown that he had disposed of any of his property with a view to the future benefit of himself or family. The future benefit here mentioned was a benefit to be received and enjoyed after the date of the petition. An imprisoned debtor could not be discharged who had thus secured for himself the benefit of property which ought to have been and to be appropriated to the payment of his debts. But the claim is, that he had disposed of some of his property with intent to defraud the creditors. What creditors are here meant? Plainly the creditors who could be defrauded by the disposition complained of. There must have been an intent to defraud existing creditors, of whom the creditor contesting the discharge would be

In re Brady.

one. A fraud committed years before upon a class of creditors whose claims had been paid or had ceased to exist, would not prevent a discharge, and a creditor could not contest the discharge on the ground of a fraudulent disposition of property who was in no way injured or defrauded. The fraudulent made here was with intent to defraud the very creditors who oppose the discharge.

That this construction of the statute may lead in some cases to unlimited imprisonment is possible, but we have nothing to do but to construe the law and enforce it as it is. We have no power to abrogate it or soften its hard features. At the time of the adoption of this statute imprisonment for debt was authorized in all cases. The honest and dishonest debtors shared the same hard lot. The sole object of this statute was the discharge of honest debtors who made an honest and full surrender of all their property for their creditors. It was not intended to benefit creditors who had disposed of their property for the purpose of defrauding the very creditors at whose suit they were imprisoned. Even under the non-imprisonment act, passed subsequently, which in most case abolished imprisonment for debt, Chap. 300 of the Laws of 1831, such a debtor could not be discharged under Article 3 of the same title and chapter above mentioned commonly known as the two-thirds act, nor under Articles 4 and 5 in reference to "voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment."

The policy of the law is thus plainly indicated. Without further discussion here it is sufficient to express concurrence in the satisfactory opinion at General Term. But it has been suggested that the appeal to the General Term was not authorized. We are of the opinion that it was.

This was a special proceeding as defined by the Code. (Secs. 1, 2, and 3 of the Code.) By Chap. 270 of the Laws of 1854, an appeal to General Term of the Supreme Court is authorized from an order or final determination of the Special Term in any special proceeding.

The order of the Special Term in this proceeding was

In re.Brady.

therefore appealable, unless the statute regulating the proceeding makes it final.

Section 6 of Article 6, provides that the court "shall proceed in a summary way to hear and determine the proofs and allegations, and may examine the applicant or his wife, or any other person on oath, and if satisfied that the petition and account of the applicant are correct, and that his proceedings are just and fair, shall order an assignment to be made of all his property," &c. There is no provision that the order shall be final or conclusive, but simply one that the order shall not be made until the court shall be satisfied. A court must always be satisfied of the existence of certain facts as the basis of its action before it can make an order, and yet it has never been held in any reported case that such language used in a statute evinces a legislative intention that an order made shall be final and conclusive in the sense that it cannot be appealed from.

The law of 1813 (2 R. L., 408), regulating the opening and laying out of streets in the city of New York, provides for the appointment of Commissioners of Estimate and Assessments, and that their report shall be confirmed by the Supreme Court, and that such reports when confirmed, shall be "final and conclusive." It has been held that no appeal will lie to the Court of Appeals from such an order of confirmation made by the Supreme Court—that the words "final and conclusive" were used to forbid an appeal. (*Matter of Commissioners of Central Park*, 50 N. Y., 493; *Matter of Canal and Walker Sts.*, 12 N. Y., 406.)

The same words were held to prevent an appeal to the Court of Appeals from an order of the Supreme Court made at the General Term confirming the report of commissioners to appraise the compensation to be made for lands proposed to be taken under the general railroad act. (*In matter of the N. Y. C. R.R. Co. v. Marwin*, 11 N. Y., 276.)

The right to review the decision of a single judge sitting at Special Term in a matter affecting substantial rights being general and fundamental, it must be deemed to exist, unless

 Nimmo v. Kuykendall.

the intent to destroy it is expressed with great clearness. It cannot be said that such an intent is expressed in the statute under consideration.

The order of the General Term must be affirmed, but without costs of appeal to this court to either party.

FOLGER, RAPALLO, and ANDREWS, concur; CHURCH, CH. J., ALLEN and MILLER, JJ., dissent; CHURCH, CH. J., votes for reversal of order of Special Term on the merits; ALLEN and MILLER, JJ., so vote on the ground that no appeal lies from the Special to the General Term.

Order affirmed.

 SUPREME COURT—ILLINOIS.

DECIDED JUNE, 1877.

A debtor in failing circumstances may make an assignment of his property for the benefit of his creditors, and if fairly done, passes the title to his property to his assignee, and the same is not subject to a subsequent levy of an execution upon it against the debtor.

The question of fairness is one of fact for the jury, or the court sitting as a jury, and will not be disturbed when the question is properly submitted. An assignment may be held valid, although it prefers certain creditors over others.

NIMMO v. KUYKENDALL.

APPEAL from the Circuit Court of Union County, the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. Jackson Frick, for the appellant.

Mr. Andrew W. Duff, for the appellee.

BREESE, J.—This was replevin in the *cepit* and *detinet* in the Union Circuit Court, wherein Andrew J. Kuykendall was plaintiff, and Alexander J. Nimmo, defendant, the matter in controversy being certain goods, wares, and merchandise, which the defendant, as sheriff, had levied upon as the goods and chattels of one Philip Mead, by virtue of sundry execu-

Nimmo v. Kuykendall.

tions in his hands against Mead issued upon judgment regularly entered against Mead in the County Court of Union County on the 12th of January, 1875.

The plaintiff claimed the property in virtue of a deed of assignment made by Mead to him on the ninth day of January, 1875, three days prior to the rendition of the several judgments, for the benefit of Mead's creditors, without any reservation or exceptions whatever, and the only question is as to the fairness and legality of this transaction.

Appellant contends the assignment was made by Mead to hinder, delay, and defraud his creditors, and therefore null and void as against these executions.

This question was fairly and fully submitted to the court for determination instead of a jury, and the finding of the court on the authority of repeated decisions of this court must have the same force and effect as the verdict of a jury.

We cannot say the court decided wrong, for the bill of exceptions does not purport to contain all the evidence, and we must presume there was sufficient evidence to warrant the court in the finding. Nor does it appear any exception was taken to the finding or any motion made for a new trial. According to the doctrine of this court as repeatedly declared, no motion for a new trial having been made we cannot examine into the question of propriety of the finding. (*Reichwald v. Gaylord et al.*; 73 Ill., 503; *Choate v. Hathaway*, Id., 518, and previous cases, *Bills v. Stanton*, 69 Id., 51). But looking at the testimony found in the bill of exceptions we are not of opinion the finding should be disturbed. The assignment in this case was made evidently for the purpose of benefiting all the creditors of Mead. It was a general assignment for that purpose, and does not come within the scope of *Thornton v. Davenport et al.* (1 Scam., 296), and kindred cases. The proof fails to disclose any indications of fraud, certainly no stronger indication than were manifested in *Powers v. Green* (14 Ill., 387), which was an assignment by a debtor in failing circumstances, giving preference to certain creditors. The jury there held the assignment valid, and this court refused to disturb the verdict,

Matter of True.

although stronger circumstances of fraudulent intent were there disclosed, yet the jury found the transaction was fair and this court would not interfere. So were the transaction free from fraud or fraudulent intent we cannot interfere to set aside the finding. But we are disposed to concur fully with the Circuit Court, that the transaction was a fair one, made in good faith and an honest purpose.

This court said in *Wilson v. Pearson*, assignee (20 Ill., 81): A debtor in failing circumstances may make an assignment for the benefit of his creditors, and if fairly done passes the title to his property to his assignee. The question of fairness of the transaction is one of fact for the finding of the jury, and their finding, when the question is properly submitted, will not be disturbed. Here, the court sitting as a jury has found in favor of the assignment and there is nothing in the record requiring this court to gainsay it.

The judgment is affirmed.

Judgment affirmed.

NEW YORK COMMON PLEAS.

SPECIAL TERM, JANUARY, 1878.

An attachment obtained by a creditor on the ground that an assignment for the benefit of creditors is a fraudulent disposition of the debtor's property can only be levied upon the property and not upon its proceeds.

The proceeds can only be reached by an action in equity by creditors against the assignee, after exhausting their legal remedies.

The proceeds of collected claims are regarded in the same light as proceeds of sales of property.

Matter of TRUE.

MOTION by assignee, True, to have his attorney pay over to him moneys the proceeds of the trust estate assigned to him for the benefit of creditors. It was claimed by his attorney that an attachment had been levied upon the funds in his hands by

Matter of True.

a creditor of the assignor's obtained upon the ground that the assignment was fraudulent.

DALY, J.—The attachment of Thomas Hanley, a creditor of the assignors of Foley & Co., which was issued by the Marine Court on the ground that Foley & Co. had fraudulently disposed of their property, can be levied only upon the property claimed to have been fraudulently assigned, and not upon its proceeds. (*Lawrence v. Bank Republic*, 35 N. Y., 320; *Lanning v. Streeter*, 57 Barb., 33; *Campbell v. Erie R.R. Co.*, 46 Id., 540; *Greenleaf v. Munford*, 50 Id., 543; *McElwain v. Willis*, 9 Wend., 569.)

In this case the attachment was levied on two classes of property in the possession of David Leventritt, attorney of the assignee, viz. 1. moneys collected from debtors of the assignors upon claims placed in Mr. Leventritt's hands by the assignee for collection; and 2, claims against other debtors of the assignors uncollected.

The proceeds of collected claims are to be regarded in the same light as proceeds of sales of property. When the claim is uncollected the debt may be levied on under the attachment, but when the debt has been paid before the attachment is issued nothing remains which is the subject of levy, and the creditors of the assignors can only reach the proceeds by action in equity against his assignee after exhausting their legal remedies.

It follows therefore that whatever moneys had been collected by the attorney for the assignee before the attachment was issued are not the subject of attachment, and may be paid over by Mr. Leventritt to the assignee.

Wallace et al. v. Wainwright et al.

SUPREME COURT—PENNSYLVANIA.

NOVEMBER 21, 1878.

None of the statutes of Pennsylvania relating to assignments for the benefit of creditors require that they shall be drawn in any specific form.

An assignment expressed to be in payment of certain creditors named therein *Held*, to be an assignment for the benefit of the creditors designated, and one, too, by which those creditors were preferred, and that not having been recorded within thirty days, it was void under the acts of 1818 and 1843.*

WALLACE et al. v. WAINWRIGHT et al.

ERROR to the Court of Common Pleas of Clearfield County.

This case was a feigned issue framed to try the question of the right to certain judgments as between Wallace & Krebs, to whom the judgments had been assigned by John Irvin and John Irvin & Brothers, and Wainwright & Co., judgment creditors of said Irvins, who had attached the same as the property of said Irvins, by attachment execution issued out of the Court of Common Pleas to No. 154, September Term, 1877, against Irvins, defendants, and a number of their judgment debtors as garnishees.

The attachment was issued on the 23d of June, 1877, and served on the defendants and on a number of the garnishees the day it was issued, and on the others, soon afterwards. On the same day the following assignment was filed :

“CURWENSVILLE, Pa., June 20, 1877.

“Whereas, John Irvin & Brothers are indebted to and owing B. F. Fullerton, George R Price (and twenty-seven other individuals and firms) certain sums not now definitely ascertained.

“And whereas, John Irvin & Brothers are unable to satisfy the above named creditors by a payment in full of their several demands in money.

“Now, June 20, 1877, for value received, we hereby assign, transfer and set over to Wallace & Krebs, in payment of the

Wallace et al. v. Wainwright et al.

above named creditors, the judgments and claims as per annexed schedule, all the right, title and interest of us, the undersigned members of the firm of John Irvin & Brothers, and of John Irvin individually.

“JOHN IRVIN & BRO’S.

“JOHN IRVIN.”

[Schedule of large number of judgments attached to the above assignment.]

This assignment was not recorded; many of the creditors named were clients of Messrs. Wallace & Krebs, whose claims were then in their hands; the judgments assigned as above were judgments of record, in favor of Irvins and against the garnishees named in the attachment issued by Wainwright & Company, who were not named in the assignment, and of which they had no knowledge at the time of issuing their attachment.

On the 12th of July, 1877, Wallace & Krebs presented their petition in court, setting forth the assignment of the judgments to them, and asking the court to quash the attachments; whereupon the court ordered an issue to be framed to test the rights of the respective parties to said judgments, which issue was accordingly framed, wherein Wainwright & Company were made plaintiffs, and Wallace & Krebs defendants.

Upon the trial, the court below (Mayer, P. J.) instructed the jury as follows:

“After full consideration and reflection I have made up my mind to direct the jury to find for the plaintiffs, and reserve the question of law, whether or not the writing dated 20th of June, 1877, executed and delivered by John Irvin & Brother, and John Irvin to Wallace & Krebs was an assignment in trust for the benefit of creditors.

“It is a case of considerable importance to both parties. I do not see that this disposition of the case can do either party any harm.”

Verdict accordingly for plaintiffs.

Wallace et al. v. Wainwright et al.

Subsequently, on the reserved point, the court filed the following opinion :

" On the trial of this cause, we instructed the jury to find a verdict for the plaintiffs, subject to the opinion of the court on the question of law reserved, whether the writing dated June 20, 1877, executed and delivered by Irvin & Brothers, and John Irvin, to Wallace & Krebs was an assignment in trust for creditors. Being of opinion that this assignment constitutes an assignment in trust for the benefit of creditors, coming within the provisions of the Act of Assembly, and not having been recorded in the county within thirty days after the execution thereof, it is null and void as against the creditors of the assignors, and that the attachment of the plaintiffs must prevail. We therefore enter judgment in favor of the plaintiffs upon the verdict."

Defendants took this writ, assigning for error the direction to find for plaintiffs, and the opinion of the court on the point reserved.

Messrs. Wallace & Krebs, for plaintiffs in error, contended, that under the instrument dated June 20th, there was a direct payment to the creditors named ; that no trust rested upon plaintiffs in error other than that which exists between attorney and client (*Chaffees v. Risk*, 12 H., 433; *Henderson's Appeal*, 7 C., 504; *Beans v. Bullitt*, 7 Sm., 221; *Taylor v. Cornelius*, 10 Sm., 187; *Clafflin v. Maglaughlin*, 15 Sm., 492.) That the act of 24th of March, 1818, should be strictly construed. An instrument not within the exact letter of the act should not be declared to be an assignment within its provisions.

Frank Fielding and *J. B. McEnally, Esqrs.*, for defendants in error, contended that every assignment made to any third person for the benefit of creditors is an assignment in trust within the meaning of the act ; to escape the provision of the law, the assignment must be made directly to the creditors. *Appeal of Miners' National Bank*, 7 Sm., 193; *Dreisbach v. Becker*, 10 C., 153; *Murphy's Appeal*, 2 Pittsb., 271; *Engelbert v. Blan-*

Wallace et al. v. Wainwright et al.

jot, 2 Wh., 240; *Blabon v. Lewis*, 3 Phila., 454; *Finney v. Finney*, 4 H., 380; *Planigan v. Wetherill*, 5 Wh., 285.) Under the provisions of the Acts of 24th of March, 1818, and of 17th of April, 1843, the assignment is void.

WOODWARD, J.—On the 20th of June, 1877, an instrument was executed by John Irvin & Brothers, and John Irvin individually, in order to secure certain designated creditors, some thirty in number, who held claims against the firm. After reciting an indebtedness in sums not definitely ascertained, and the inability of the firm to satisfy the creditors by a payment in money, the instrument contained this concluding clause: "For value received, we hereby assign, transfer and set over to Wallace & Krebs, in payment of the above-named creditors, the judgments and claims as per annexed schedule, all the right, title and interest of us, the undersigned members of the firm of John Irvin & Brothers and of John Irvin individually." A schedule of the judgments and claims was attached to this assignment. Some of the creditors named in the instrument were present, and assented to the arrangement somewhere represented by Messrs. Wallace & Krebs as counsel, and some were neither present nor represented. Wainwright & Co., the plaintiffs below, held a judgment against Irvin & Brothers, upon which they issued this attachment, the defendants in the judgments and claims assigned being served as garnishees. At the trial in the Common Pleas the question as to the character of the paper executed by the Irwins was reserved, and the jury were instructed to render a verdict for the plaintiffs. Upon the ground that the instrument constituted an assignment for the benefit of creditors, and, as such, that it had not been recorded within thirty days, the court afterwards entered judgment on the verdict. This is alleged to have been error.

None of the Acts of Assembly relating to the assignments for the benefit of creditors have required that they should be drawn in any specific form. Such instruments were well known and in common use when the Act of the 24th of March, 1818, was passed, and neither before nor after its passage was

Wallace et al. v. Wainwright et al.

any particular collocation of words held necessary to give to a writing the effect of an assignment. Since 1818 property transferred to one person, to be employed, paid over or converted for the benefit of others, has been regarded as property held in trust within the operation of the statute. "Of course," Chief Justice Lowrie said, in *Fallon's Appeal*, (6 Wright, 235) "the courts cannot allow the law to be invaded by any sham departure from the general form of assignments, and when the transaction is substantially an assignment for the benefit of creditors, involving no other important purpose that would be prejudicial by bringing it under the Act of 1818 (now 1836), the substance rather than the form must be regarded." Judge Lewis, in *Chaffees v. Risk* (12 Harris, 432), defined a trust as existing "where the legal estate is in one person, and the equitable interest in another." In *Watson v. Bagaley* (2 Jones, 164), a letter of attorney authorizing the collection and receipt of moneys, debts and goods, and the payment of the proceeds to creditors in a prescribed order of preference, although revocable before the execution of the power, was held to be, after execution, virtually an assignment for the benefit of creditors, and as such, Chief Justice Gibson said: "It was decisively within the purview of the statutes to regulate such transfers; else those statutes might be evaded and the pernicious power to prefer be retained by changing the form of the instrument." But it has been urged that the assignment to Messrs. Wallace & Krebs was "in payment" of the creditors and not in trust for them. Still the legal title to the securities became vested in the assignees, and the equitable interest was all that the creditors acquired. By the Act of the 16th of April, 1849, it was declared that a condition in an assignment for the payment of such creditors only as should execute a release, should be deemed a preference and be void. The stipulation here that the securities transferred should be "in payment" of the debts owing by Irwin & Brothers, if the word "payment" was used in the sense of satisfaction, was but the equivalent of a condition for payment upon release. It could not be known whether the amount to be realized would satisfy the indebted-

Wallace et al. v. Wainwright et al.

ness or not. Some of the creditors were not represented, and their right to participate in the fund would be dependent on their consent to take such share of it as would come to them in discharge of their demands. The Act of 1849, as well as the Act of the 17th of April, 1843, applied to assignments of property made by debtors to trustees "on account of inability at the time to pay their debts." This instrument expressly recited the firm of Irwin & Brothers to be in just that condition. They were unable to pay their debts; they assigned to third persons securities to a large amount to be held and collected for a portion of their creditors, and they stipulated that the creditors thus benefited should receive the proceeds of the securities "in payment" of their claims. It is impossible to see how this can be treated otherwise than as an assignment for the benefit of the creditors designated, and an assignment, too, by which those creditors were preferred. If the language of the instrument were to be construed as providing for a payment on account, and not in full of the demands of the creditors, its effect would only be altered to the extent that the condition for a release would not be implied. In principle this case is not distinguishable from that of the *Miners' National Bank's Appeal* (7 P. F. S. 193). In apparent features, indeed, the difference consists in the fact that the whole object of the transaction was expressed in that case with stated results precisely the same as those which the legal operation of this assignment would work out. Charles Miller assigned twenty-one items of property to William Miller and Morris Patterson, in trust, to sell at their discretion, and apply the proceeds to the payment of twenty-four named creditors, the surplus, if any, being payable to the assignor, but it was provided that if the proceeds should not pay the creditors in full, it should be disbursed among them pro rata. Upon these facts, the present Chief Justice said: "When a man can no longer go on in business, and what he has must pass into the liquidation of his debts, fairness requires that he should not dictate the course his property shall take. The Act of the 17th of April, 1840, is entitled 'An Act to prevent preferences in assignments, and it is

Wallace et al. v. Wainwright et al.

argued from the title that its intention was only to forbid preferences expressed in the deed itself. But this is contrary to the public sentiment which led to the proposal of the act, and to the plain intent found upon its face. It would enable the debtor always to prefer creditors simply by framing his deed to suit his purpose. He has thus to name only those he would prefer, and leave others out, and indeed under that construction of the law, I see nothing to prevent his multiplying his deeds, and thereby to divide his estate and graduate his preferences." The opinion went on to prove that the Acts of 1843 and 1849 were intended to secure a distribution of the property transferred among the whole body of the creditors of the assignor, where the assignment, whether general or partial, should be made in anticipation of impending failure. The whole reasoning of the Chief Justice, as well as the views expressed by Judge Brewster, in his lucid and thorough discussion of the same case, apply here with direct and peculiar force.

Numerous authorities have been referred to and relied on by the counsel for the defendants. They have been examined and considered, and none of them have been found to support the allegation of error in this judgment. *Chaffees v. Rich* (12 Harris, 432), was the case of an assignment made directly to the creditors of the assignor. Judge Lewis said that by such an assignment "the legal estate and the equitable interest are vested in one and the same person." *Henderson's Appeal* (7 Casey, 502) was also the case of an assignment of a number of claims in the hands of an attorney, made directly to the persons beneficially interested. The claims were described by reference to a list which H. L. Richmond held. On the margin of this list, after the execution of the assignment, there was written: "I assign to H. L. Richmond this list of accounts for the uses named in his receipt to me of this date," and this was signed by the assignor. In the discussion by this court of the effect of these instruments, it was said: "The defendants insist that the debt of Townley, and all the debts in the list alluded to, did not pass under the assignment we have been consider-

Wallace et al. v. Wainwright et al.

ing, but was intended to pass under an assignment made the same day by Osborn to Richmond, in trust for the benefit of the New York creditors, and that this assignment was clearly within the Act of 1818, and therefore, not being recorded, was void as against a subsequently attaching creditor. This conclusion is inevitable if the premises are well assumed." The two instruments, however, were held to constitute together one transfer. And the paper given to Richmond was treated as designed to pass over the "list" of the accounts to him as the attorney of the New York creditors, to whom the accounts contained in that list had been formally assigned. There was thus an express declaration by this court that if the case stood on the assignment to Richmond alone, it would have been within the Act of 1818. In the *York County Bank v. Carter* (2 Wright, 446) partners who were heavily indebted, transferred their entire property to a creditor, in consideration of his satisfaction of his claims against them, and his agreement to pay the balance of the purchase money in discharge of the debts of certain other specified creditors. It was held that the papers imported a sale, and not the creation of a trust for creditors, and that though it might have been shown by parol evidence that such a trust was intended, it was a question of fact for the jury, and not of law for the court. The facts in *Fallon's Appeal* (6 Wright, 235) showed a sale through the intervention of trustees, with a security analogous to a mortgage for the purchase money, and not an assignment for the benefit of creditors. All that *Vallance v. The Miners' Life Insurance Co.* (6 Wright, 441) settled, was that an assignment or transfer of property made directly to the creditors beneficially interested in it, whether in satisfaction of, or as a security for their debts, was not within the Act of 1818. Of the three instruments set up to establish a trust for creditors in *Beans v. Bullitt* (7 P. F. S., 221) the first was decided to be a mortgage, the second a power of attorney, and the third an absolute transfer directly to sixteen creditors, and in neither of them was any trust intended or expressed. In *Taylor v. Cornelius* (10 P. F. S., 187) a debtor conveyed all his real estate to a creditor,

Bostwick, Assignee, etc., v. Burnett.

who, at the same time, made a declaration of trust that he would sell all or part of the property, apply the proceeds in payment of the debts due himself, and such sums as he should advance, and five thousand dollars for his commissions, and convey the remaining property to the debtor. Of course these instruments were treated together as constituting a mortgage. In *Claffin v. Maglaughlin* (15 P. F. S., 492) choses in action were assigned directly to creditors, and the instrument transferring them contained a direction to the attorney, who had the claims in his hands for collection, to pay the proceeds to the assignees. This, it was decided, was not an assignment required to be recorded under the Act of 1818. It may be remarked in passing, that the President of the Common Pleas, in his opinion in *Claffin v. Maglaughlin*, omitted, in referring to Henderson's Appeal, to state the essential fact that the ruling in that case rested on the assignment of the securities to the creditors themselves, and not on the transfer of the list to Mr. Richmond. It is to be kept in mind that Messrs. Wallace & Krebs had no beneficial interest whatever in the claims assigned to them. They were neither creditors nor purchasers; they had made no advances, and they had no lien. Under the facts presented, it is not believed that there is any precedent to warrant an interference by this court with the record made up in the Common Pleas.

Judgment affirmed.

N. Y. COURT OF APPEALS.

NOVEMBER, 1878.

The United States Bankrupt Act does not invalidate or affect a voluntary assignment valid under the laws of the State where no proceedings in bankruptcy are instituted.

Where preferences in assignments are allowed by the laws of a State where the assignment is made, the assignment is valid unless proceedings are taken against it under the United States Bankrupt Law upon that ground within the time required by that act.

The title to the assigned property vests in the assignee upon the execution

Bostwick, Assignee, etc., v. Burnett.

of the assignment, although the assignee's bond is not filed until afterwards, but within the time required by the statute.

BOSTWICK, Assignee, &c., Appellant, v. GEORGE M. BURNETT, Respondent.

THE facts sufficiently appear in the opinion by the court.

RAPALLO, J.—The assignment under which the plaintiff claims title was valid as against a subsequent execution creditor, notwithstanding the fact that it gave preferences. The United States Bankrupt Act has no application to the case. The defendant does not claim under any proceedings in bankruptcy, but under an execution issued out of a justice court; and it does not appear that any proceedings in bankruptcy have ever been instituted by or against the judgment debtor. The Bankrupt Act provides that preferences made within a specified time prior to the filing of a petition in bankruptcy may be avoided. If made anterior to the prescribed time they may stand even as against an assignee in bankruptcy. There is nothing in the Bankrupt Act which invalidates or affects a voluntary assignment valid under the laws of the State where no proceedings in bankruptcy are instituted. Such an assignment may be an Act of Bankruptcy which would authorize the filing of a petition by creditors, but if no proceedings in bankruptcy are instituted and the creditors proceed under the laws of the State for the collection of their debts, those laws must govern and no question under the Bankrupt Law can arise.

The property having been wrongfully taken from the possession of the plaintiff, no demand was necessary. No point as to demand was made on the trial. The only point there taken was, that the title had not passed to the assignee at the time defendant levied, the assignee not having then filed his bond. That objection was untenable. The bond was filed within the time prescribed by the act.

The judgment should be reversed and a new trial granted. Costs to abide the event.

CHURCH, CH. J., FOLGER and ANDREWS, JJ., concur. MILLER and EARL, JJ., absent.

Greene, Assignee, etc., v. The National Security Bank.

COMMON PLEAS—PHILADELPHIA.

JANUARY 11, 1879.

An assignee for the benefit of creditors deposited the proceeds of the estate in the name of the assignor, without notice to the bank of the assignment. *Held*, That he could maintain an action for the moneys so deposited.

In Pennsylvania a bank may set off the amount of notes of a depositor held by it, not matured at the date of a voluntary general assignment by such depositor, against the moneys in its hands on deposit at that time.

E. A. GREENE, Assignee of WILLIAM R. STEWART
v. THE NATIONAL SECURITY BANK.

Sur rule for new trial.

ON January 21, 1878, William R. Stewart made a general assignment to the plaintiff for the benefit of creditors. The assignor had a deposit account with the bank, defendants, in which, at the date of the assignment, the balance in favor of Stewart was one thousand seven hundred and nine dollars and three cents. The assignee employed the assignor as clerk. The latter continued the deposit account with defendants in his own name, made new deposits of moneys realized from the assigned estate, and drew checks, the proceeds of which were used for the assignee, or accounted for to the assignee. On February 16, 1878, the balance in said deposit account to the credit of William R. Stewart was four thousand nine hundred dollars and forty-five cents. Plaintiff then presented the check of Stewart, drawn to the order of plaintiff, as assignee, for the whole of this balance. The bank refused to pay that check, but paid plaintiff two thousand six hundred and seventy dollars, and sixty-six cents.

This suit was commenced on February 19, 1878, for the difference between the two thousand six hundred and seventy dollars and sixty-six cents and the four thousand nine hundred dollars and forty-five cents, being two thousand two hundred and twenty-nine dollars and seventy-nine cents, with interest.

Greene, Assignee, etc., v. The National Security Bank.

Learning then for the first time of Stewart's insolvency and assignment, defendant denied the right of plaintiff to sue in his own name for any part of the amount claimed, and further claimed to set-off or recoup the amount of two promissory notes, one dated November 12, 1877, payable three months after date, due February 15, 1878, for nine hundred and eighty-seven dollars and forty-one cents; the other dated November 15, 1877, at five months, due April 18, 1878, for one thousand two hundred and forty-two dollars, and thirty-eight cents. Both these notes were drawn by the assignors, William R. Stewart & Co., in favor of Stokes.

The judge who tried the cause instructed the jury to find for the plaintiff for only the difference between one thousand seven hundred and nine dollars and three cents, and the two thousand two hundred and twenty-nine dollars and seventy-nine cents, for which suit was brought, with interest. Thus allowing the bank to set-off or retain the amount in its hands at the date of the assignment as against the two notes. The verdict being for five hundred and forty-eight dollars and eighty cents.

John Fallon, Esq., for plaintiff, cited to sustain the right of action, *Fraizer v. Bank* (8 W. & S., 18); *Bank v. Jones* (6 Wright, 541); *Stair v. Bank* (3 Smith, 368).

The debtor of an insolvent decedent's estate cannot have set-off for claim not due at the death (*Conrad v. Bank*, 1 Binn., 64; *Bosler v. Bank*, 4 Barr, 32; *Bank's Appeal*, 12 Wright, 57).

This case decided by *Bank of Mt. Joy v. Gish* (12 Smith, 13); *Fogarty v. Trust Co.* (25 Smith, 125); *Myers v. Davis* (22 N. Y., 489); *Jeffreys v. Agra Bank* (2 Eq. Cases L. R., 674.)

Edward. H. Weil and *R. C. McMurtrie, Esqs.*, for defendant. The plaintiff cannot sue at law. *Fulton's Estate* (1 Smith, 204).

Insolvency introduces the jurisdiction in equity, and entitles the debtor to set off or retain for a debt due but not

Greene, Assignee, etc., v. The National Security Bank.

payable. (*Peters v. Sloan*, 2 Vernon, 428 ; *Hanson's Estate*, 12 Ves., 348 ; *Villamy v. Noble*, 3 Meriv., 621 ; *Marr v. Dunagan*, 11 S. & R., 75 ; *Haukey v. Smith*, 3 T. R., 507 ; *Agra Bank v. Hoffman*, 34 L. J. Ch., 285).

ELCOCK, J.—Set-off has its origin in the Roman law, where it was administered under the name of *compensatio*. It was known in the early period of Chancery in England as stoppage, and was administered for a great number of years in that court before it became a statutory enactment. The injustice apparent from the administration of the old bankrupt laws, without the allowance of set-off, is well expressed by Lord Mansfield, when he said : “ The natural sense of mankind was first shocked at the doctrine ; they thought it hard that a person should be bound to pay the whole that he owed to a bankrupt, and receive only a dividend of what the bankrupt owed him.” Being unknown at common law, the remedy induced by this hardship was afforded in bankruptcy by Statute 4 Anne, c. 17, and generally in cases of mutual debts by 2d and 8th George II.

The early advancement of American legislation is shown by our Defalcation Act in Pennsylvania, passed in 1705, 1 Smith's Laws, 49, which was twenty years before the Statutes of George II. Being a more liberal act, it allows unliquidated cross demands to be set off, avoiding circuitry of action, and approaching nearer an equitable mode of administering right than any known species of civil legislation.

By our act the defendant may give in evidence against the plaintiff's demand any bond, bill, receipt, account or bargain, and so much thereof as has been found to be paid shall be defalked from plaintiff's claim. This in Pennsylvania is commonly called legal set-off, although not a proper title. But whatever refinement may be created by the statutory enactments in this and other countries, in Pennsylvania, by our admirable system of administering equity through the common law forms of action, where the defendant in an action at law, if in an equity court as complainant, would be entitled to a decree and relief for his set-off, he can now give the same facts

Greene, Assignee, etc., v. The National Security Bank.

in evidence, and obtain the same relief in the action at law. (*Morgan v. The Bank of North America*, 8 S. & R., 73, 88; *Murnay v. Williamson*, 3 Binney, 135; *Frantz v. Brown*, 1 Penrose & Watts, 257.)

This action, brought to recover the amount of money claimed to have been deposited by plaintiff in the name of Stewart, without notice to the bank, can be maintained under the rulings in *Fraiser v. Erie Bank* (8 W. & S., 18); *Bank of Northern Liberties v. Jones* (6 Wr., 541); *Stair v. York City Bank* (5 Smith, 368).

It is true the rights of an assignee for the benefit of creditors rise no higher than those of his assignor; neither he nor the creditors are purchasers for value, and he holds subject to all equities which can be applied to his assignor. (*Krause v. Beitel*, 3 Rawle, 199; *Fulton's Estate*, 1 Smith, 211.) But being entitled to the custody of the money, and accountable for it thus deposited in another's name, he can maintain the action for it.

Undoubtedly if the notes of Stewart held by the bank had matured before the assignment, the bank could appropriate the money owing to Stewart on deposit account at the date of the assignment in payment of them. The question now raised is whether the bank can hold the moneys in its hands on deposit at the time of the assignment against the two notes which had not then matured.

If any equity springs from the fact of Stewart's insolvency in favor of the bank, then it can hold, or stop, or defalcate, or set off or defend to that extent. The relationship between a bank and its depositor or customer is simply that of debtor and creditor, for no ear-mark follows the deposit, and the banker uses the same in the general purpose of his business. The bank becomes a creditor of the maker of the notes when it discounts the same, and his debtor when he makes deposits. The maker's debt is created when he issued his note; it is true the time to maturity is his right before payment can be demanded, but the debt exists from the time of issuing the note. The maker has an undoubted right to waive this time and anticipate it by pay-

Greene, Assignee, etc., v. The National Security Bank.

ment. Where a maker becomes insolvent and makes a general assignment of all his estate for the benefit of all his creditors, is it unreasonable to say that he waives further time upon his credit, and expressing his insolvency or inability to pay then, or at maturity, by such act, mature all his debts. He has the power; do not his acts show its exercise? Time on his note is of no further importance to him, and his other creditors have no greater rights than he granted them. In bankruptcy, since Statute of 4th Anne, a creditor whose debt was not due had a right to prove it and secure a dividend, and it is deducible from the general scope of the authorities, that insolvency has long been recognized as a distinct equitable ground of set-off. (Story's Eq. Jurisp., Sec. 1430; *Peters v. Sloan*, 2 Vern., 428; *Hanson E.*, 12 Ves., 348; *Villamy v. Noble*, 3 Meriv., 621; *Haukey v. Smith*, 3 T. R., 507 and 374; 1 Y. & Coll., 427.)

In a late English case (*Agra Bank v. Hoffman*, 34 L. J. Ch., 285) the bankers retained the balance of a customer to answer a future liability which might arise in respect of bills which they had discounted for him to a much larger amount than the balance, and the customer brought an action against the bankers for damages for having dishonored his checks, and for the amount of his balance. After the action was commenced several of the above bills to a larger amount than the balance were dishonored. Upon a bill filed by the bankers against the customer for an account and for an injunction to restrain the action at law, the court (considering there was a substantial question to be tried in equity), upon motion made during the sittings in London, at which the trial of the action was to take place, granted an injunction restraining the action at law.

In *Denman v. Boylston Bank* (5 Cush., 194) it was held that where the maker of a promissory note which had been discounted at bank became insolvent, having money on deposit in such bank, that the amount of the note might be set off against the amount of the deposit, although the note was not payable until afterwards; and upon the same principle was decided *Aldrich v. Campbell* (4 Gray, 234); *Receivers v. The*

Greene, Assignee, etc., v. The National Security Bank.

Patterson Gas Co. (3 Zab., 238); *Morrow v. Bright* (20 Mo., 299); *Clarke v. Hawkins* (5 R. J., 219); *Brazblow v. Brooks* (2 Head., 194); *Graves v. Hull* (27 Miss., 419); *Marr v. Dungan* (11 S. & R., 75). And to this we may add the remarks of the able editor of Smith's Leading Cases, Vol. 2, p. 378, when, after reviewing all the authorities upon this subject, he says: "We may believe with the courts of Massachusetts and Rhode Island, that in settling an insolvent estate justice is best promoted by allowing mutual debts to balance each other without regard to the period when they fall due."

It has been urged with great ability by the learned counsel for plaintiff that under the ruling of *Bosler v. The Bank* (4 Barr, 32), which decided that a debt not due at the time of the death of the testator, or intestate insolvent, could not be set-off (affirmed in the *Farmers and Mechanics' Bank's Appeal*, 12 Wright, 57), by analogy a debt not due at the time of the assignment for the benefit of creditors could not be set-off by a debtor of the assignor. The difference, however, is very marked. A decedent's estate is administered by a system of laws in which everything has relation to the time of his death. This may be a law of necessity, but in an assigned estate, the assignor living, no such rule applies. The act of God having terminated the relationship of continuous or mutual credit, the creditor cannot complain, and cannot have his set-off, because the law administers the assets at the time of death, and creditors and heirs become interested, whilst the assignor has his liberty of anticipating payment of providing for a residue after payment, and passes his estate and all his rights, subject to all equities which apply to himself. His assignee is but his hand in the distribution of his estate. This distinction has already been made in *Jordan v. Shurlock* (3 Norris, 368), where Chief-Justice Agnew (being a case in principle much like the present) said: "At the moment of his death the law took possession of his estate for the benefit of his creditors, he being insolvent. It was not the case of a mere voluntary transfer; but new rights spring into being on the instant of his death. But a voluntary assignment has no such effect. It does not alter the status

Greene, Assignee, etc., v. The National Security Bank.

of the rights of creditors, as death does of the decedent's estate. It is true the duties and obligations of the assignee are regulated by law, but the transmission of the estate to them is the merely voluntary act of the debtor."

The tendency of the decisions appears to us to destroy any such analogy as that sought to be established.

It is true that in New York and Michigan, in the cases of *Wells v. Stewart* (3 Barb., 40); *Keep v. Lord* (2 Duer, 84); and *Lockwood v. Beckwith* (6 Mich., 168), it has been determined that a claim not due could not be set-off against insolvent assigned estates, but those cases were determined under the construction of the particular statute of set-off in New York, and the claims being upon independent and disconnected demands which forbid their admission.

Custom, as well as the equity of commercial law, favors this set-off unless a bank can presume upon the right to stop or retain deposits on account of discounts afforded to its customers, even in anticipated insolvency, a great restriction will necessarily be cast by the banks upon their honest but poor depositors or customers. Bankers should have the same rights as in principle is applied by the merchant who, shipping his goods, upon learning of his customer's insolvency, stops them in transitu, and thus saves or retains his goods or property. Banks discount commercial paper upon the faith of their customer's deposits, and the floating balance in their hands is regarded as the business security for their discounted paper. Commercial law, with its fountain in equity, would be destroyed under the restricted and circuitous rules of the common law.

The question as to making deposits, and the drawing of checks by the assignor after the assignment, without notice to the bank of the assignment, does not become of importance in this discussion. Nor does the fact that one of the notes was not due at the date of bringing this suit, nor the fact that one of the notes was discounted for Stewart and the other purchased in the market, as the bank had no knowledge of Stewart's insolvency.

Upon the whole case, and in consideration of the authorities

In re Farnam.

herein cited, we affirm the rulings upon the trial, and the rule for a new trial is discharged.

Rule discharged.

NEW YORK COURT OF APPEALS.

DECIDED NOVEMBER 12, 1878.

An averment in a petition to compel an assignee for the benefit of creditors to account that the petitioner is a creditor is sufficient on that head to give jurisdiction, and the only effect of a denial of that fact in the affidavit of the assignee is to make an issue for the County Judge to hear, try and determine.

In such a petition it is not necessary for the petitioner to profess that he comes in behalf of all the other creditors.

The fact that the assignee has not given the bond, as required by law, does not, upon an allegation that he has converted to his own use, shield him from liability to show what has become of the property which went into his hands.

In re Assignment of FARNAM.

F. made an assignment for the benefit of his creditors to H., under Chap. 348, Laws of 1860. On September 16, 1876, the wife of F., who is the petitioner herein, presented a petition to the County Court, setting forth that she was a creditor of the assignor; that the assignee had never filed a bond or account, and had declared no dividend or paid any part of her claim, but had converted the greater part of the estate to his own use. An order was obtained to show cause why the assignee should not account and pay the petitioner the proportional part of her claim. On the return day of the order the assignee moved to dismiss the proceedings on the ground that no bond having been filed the assignment was void, and on an affidavit of the assignee, setting forth, among other things, that he acted as agent of the creditors, and not as assignee under the assignment, and that the petitioner had no claim against the estate of the assignor.

B. W. Cohen, for applt.

John L. Lindsay, for resp't.

In re Farnam.

FOLGER, J.—*First.* The first point made is, that the petitioner has not established, by a judicial proceeding against the assignee, that she is a creditor of the estate. She avers in her petition that she is a creditor. The assignee, in his answering affidavit, denies it. He claims that this denial ousts the county judge of jurisdiction and that the petitioners must, by a suit or proceeding *aliunde*, establish the validity of her claim against the estate and her ownership of it. This point is not tenable.

The petition was presented to the County Judge in 1876. As the law then stood, the County Judge had power, upon the petition of any creditor, to compel an assignee in trust for the creditors of an insolvent debtor to appear and show cause why an account should not be made. Laws of 1860, Chap. 348, p. 595, § 4. The petition in this case did aver that the petitioner was the creditor of the assignor, and it was duly verified. This was enough, on that head, to give jurisdiction. We have just held in *Whittlesey, Rec., v. Frantz*, not reported, that such an averment, in a petition for the appointment of a receiver of an insolvent corporation, is to be taken as true for the purpose of preliminary jurisdiction; and that though it may be denied, and the truth of it contested and disproved, so long as it remains undisproved it is the sufficient basis of jurisdiction.

The affidavit of the assignee does here deny the truth of the averment, but that has no more effect than to make an issue for the county judge to hear, try and determine. The bare allegation of the affidavit does not, of its own force, destroy the averment of the petition and oust the county judge of jurisdiction.

Second. Nor was it necessary for the petitioner to profess, in her petition, that she came before the judge in behalf of all the other creditors, as well as herself. The statute makes not that requirement. The county judge is authorized to act upon the petition of any creditor. See section above cited.

Third. The fact that the assignee did not give the bond, as required by law, does not, upon an allegation that he has converted it to his own use, shield him from a liability to show what has become of the property which went into his hands. Though no bond was given, in the time named in the act, the property

In re Farnam.

passed to the assignee and became vested in him. *Thrasher v. Bentley*, 59 N. Y., 649, S. C., 1 Abb. (N. C.) 39 *Syracuse R. R. Co. v. Collins*, Ib., 47. *Brennan v. Willson*, 4 Ib., 279, in which last case *Rathbone v. Juliard*, 39 N. Y., 375, is discussed. He was the assignee of it, though forbidden to sell or dispose of it to the purposes of the trust, until he had given a bond. And if he has never given a bond and yet has disposed of the property, in any way, he is liable to show how, and to account for it.

Fourth. The petition avers that the assignment was made and filed, and inferentially avers that it was delivered. It avers that Hopkins entered upon the execution of the trusts and took possession of the trust estate, and has sold and disposed of a large amount of the property assigned. His affidavit avers that the assignment was executed to him, and sets up matter to the effect that he did not accept the trust under the assignment, but took the property of the debtor by appointment of the creditors. This averment must be taken as raising an issue and no more. It presents a question for the determination of the county judge. It would never do that on a petition being presented, on which to base an order for an accounting in these cases, the pursuit of it could be thwarted by the mere making and filing of an affidavit, denying the averments of the petition and setting up affirmatively matters which, if shown to be true, would establish that no case for an order existed. Such affidavit must be looked upon in the light of a pleading and as having the effect of only presenting an issue. The matters thus alleged and denied or avoided, must be first looked into by the county judge. If it appears that he has not jurisdiction, the petition will be denied. But if it appears that there is an assignee, and that he is liable to account, the county judge will go on with the accounting.

The order should be affirmed.

"All concur. MILLER and EARL, JJ., absent at argument."

Howell et al., Assignee, etc., v. Teel et al.

IN CHANCERY—NEW JERSEY.

MAY, 1878.

Where two partners are jointly liable, and a judgment entered therefor, and after the judgment the said partners make an insolvent assignment, one of the partners being also individually insolvent, the creditor may share equally the personal effects of the other partner, and is not to be subordinated to the individual creditors of such partner.

JOSEPH HOWELL and others, Assignee, &c., v. EDMOND TEEL and others.

Bill for relief. Motion to dissolve injunction and answer.

Mr. J. F. Dumont, for the motion.

Mr. J. G. Shipman, contra.

THE CHANCELLOR.—The complainants' assignees, under an assignment made to them by James M. Andrews, under the act "to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors," by their bill seek to restrain the defendant, Teel, from executing upon the real property which passed to them, by the assignment, a judgment recovered by him against their assignor, and John C. Bennett, in the Circuit Court of Warren County, previously to the assignment.

Andrews & Bennett were, when the judgment was recovered, partners in business in Phillipsburg. They were indebted to Teel at the time of the entry of the judgment (which was by confession) to the amount of the judgment for money lent by him to them, and money paid by him for them. The judgment was entered on the 7th of February, 1876, and on the same day a writ of *fiery facias de bonis et terris* was duly issued thereon, and levied on all the real estate of each of the defendants in the County of Warren. The assignment was made on the 15th of that month. On or about the 20th of the same month, Bennett & Andrews together made an assignment

Howell et al., Assignée, etc., v. Teel et al.

to the complainant, Davis, under the act above mentioned, of all their partnership property for the benefit of creditors of the firm. Bennett is also insolvent individually. Under an execution issued on the judgment, the real estate of the firm was sold, but only a small amount of the judgment was paid by the sale.

The complainants insist that the judgment was recovered for a debt due from the firm, and that therefore Teel should be prevented from making any part thereof out of the individual property of their assignor until after the individual debt of the latter shall have been paid.

They claim the relief which they seek, on the ground that in equity the creditors of a partnership have a preference to have their debts paid out of the partnership funds before the private creditors of either of the partners; and, on the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor before the partnership creditors can claim anything. They allege that Teel put in his under the assignment of Bennett & Andrews as partners, and they insist that he thereby waived any lien he may have been entitled to under his judgment and execution thereon.

Teel, by his answer, admits that he did so put in his claim, but says that it was expressly (and that it was so stated in the verifying affidavit) put in as a claim on the judgment; he also says, in his answer, that he withdrew it on the same day on which it was put in. By so putting in his claim he did not waive any legal advantage which the judgment secured to him upon the property, which was owned by the assignors or either of them at the time when the judgment was entered. *Vanderveer v. Conover*, 1 How., 487; *Moses v. Thomas*, 2 Dutch., 124; *Bell v. Fleming*, 1 Beas., 14, 490.

The rule of equity which the complainants invoke to restrain Teel from proceeding to collect the balance due on his judgment by sale of the separate real estate of Andrews, which passed under the assignment by the latter, cannot be applied to deprive him of the lien of his judgment on that property. His

Howell et al., Assignee, etc., v. Teel et al.

judgment was entered by virtue of a bond and warrant of attorney to confess judgment thereon. The bond, it may be remarked, was joint and several. By virtue of his judgment he might have proceeded to collect the amount due upon it by levy upon and sale under execution of the separate property of either or both of the judgment debtors, and this court would not have restrained him from so doing, on the ground that the debt for which the bond was given was a partnership debt, and there was partnership property out of which he might have collected the amount due thereon. *Wisham v. Lippincott*, 1 Stock., 353; *Randolph v. Daly*, 1 C. E. Gr., 313; *Nat. Bk. of the Metropolis v. Sprague*, 5 C. E. Gr., 13.

In *Wisham v. Lippincott*, the chancellor (Williamson) said: "I have no hesitation in saying that where a joint creditor of a firm has judgment and execution levied on the separate effects of one of the partners, this court ought not, in mere compliance with any such rule, as that the separate creditors of each partner are entitled to be first paid out of the separate effects of the debtor before the partnership creditors can claim anything, to interfere with such execution, either on the application of any one of the partners or any creditor of the firm or separate creditor or any of its members. In *Nat. Bk., &c., v. Sprague*, the partners had given mortgages to secure individual debts." The chancellor (Zabriski) held that the principle, though applicable in the administration of partnership assets to be administered here, was not applicable to liens created by partners upon the partnership property before it came into this court. He said the partners, while the partnership property is still under their control, have the power to appropriate it to pay or secure their individual debts, as against them the mortgage is good. These claims are for debts by them individually, and I do not think that the mere preference of individual debts over partnership debts is such a fraud upon partnership debts that after it has been done it will be set aside by a court of equity. It certainly will not be set aside unless in case of insolvency, or when done in contemplation of insolvency to give an improper preference. See also *Meech v. Allen*, 17 N Y., 300.

Tennent v. Battey.

In the course of administration of assets, courts of equity follow the same rule in regard to legal assets which are adopted by courts of law, and give the same priority to the different classes of creditors which is enjoyed in law, thus maintaining a practical exposition of the maxim *equitas sequitur legem*. In this case there is no allegation of fraud; the simple question presented is whether a judgment, recovered for a partnership, is, in case of the insolvency of the firm, and the partners before it is collected in equity, to lose its hold as a lien upon the separate property of the partners, whether the vigilant creditor in such a case is to be held to have no advantage from the diligence which but for the insolvency of the partnership would, through a lien of judgment, have secured his debt out of the separate property of his debtor.

The injunction will be dissolved, with costs.

SUPREME COURT OF KANSAS.

JULY, 1877.

An attaching creditor has not, before he obtains judgment in the attachment suit, such a claim upon the property of the defendant as will entitle him to maintain an action to set aside an alleged fraudulent conveyance of the defendant.

TENNENT v. BATTEY.

ERROR from Marion District Court.

Frank Doster, for plaintiffs.

L. F. Keller & A. E. Case, for defendants.

BREWER, J.—Plaintiffs commenced an action against defendant Lucas on notes and an account, and caused an attachment to be issued and levied on property alleged to be his. Before prosecuting such action, they commenced this action to set aside as fraudulent and void, as against creditors, an assignment made by defendant Lucas and wife to their co-defendant,

Tennent v. Battey.

Battey, of all their property, including the property taken on attachment. A demurrer to the petition filed in this action was sustained, and the case is here for review.

The principal question is whether the plaintiffs, by the mere suing out of an attachment and causing it to be levied upon the property conveyed by the assignment, and before the fact that they are creditors has been established by a judgment, have acquired the right to litigate the validity of the assignment.

Upon this question elaborate briefs been filed by counsel on both sides, and authorities cited and commented on from nearly every State in the Union. The case has been before us for some time, and we have examined carefully the principal authorities cited by either counsel. On the mere matter of authorities a decision well fortified could be rendered either way. In *Drake on Attachment*, Section 225, we find this summary of the question :

“In connection with the lien acquired by an attaching creditor has come up, in different forms, the question of his right to secure the benefit of his lien as against fraudulent conveyances of and encumbrances upon the attached property. The first shape this question assumed was as to the right of the attaching-creditor to maintain a creditor’s bill in equity, to set aside such a conveyance or encumbrance. The doctrine that a creditor at large, before he obtains judgment, is not entitled to such a remedy, is familiar to the legal mind. ‘The reason of the rule,’ said Chancellor Kent, ‘seems to be that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary and perhaps fruitless and oppressive interruption to the exercise of the debtor’s rights. Unless he has a *certain* claim upon the property of the debtor he has no concern with his frauds.’ Such doubtless is the general rule . . . In different States the attempt has been made to establish another exception in favor of attaching creditors. In New York, a bill in favor of such a creditor was once sustained by a Court of Chancery ; but this was contrary to the uniform course of decision in that State, before and since. In Illinois and Missouri the right to maintain such a bill was

Tennent v. Battey.

denied. On the other hand, New Hampshire and New Jersey have held that an attachment confers a lien, in virtue of which the bill may be maintained. In New York, too, it was decided that an attaching-creditor is not, before he obtains judgment, entitled to impeach the *bona fides* of a judgment confessed by a debtor to a third person before the attachment was levied."

A question upon which courts have ruled so differently cannot be perfectly plain and easy of settlement. Many considerations of weight can be urged by either side, and it is not easy for either to answer fully the arguments of the other. For a full review of the authorities we refer to the briefs of counsel, and shall content ourselves with a statement of that which has influenced our decision.

While an attachment is doubtless a specific lien, it is a lien of very uncertain tenure. It is subject to defeat by the dissolution of the attachment on motion, or a judgment in favor of the defendants on the merits of the claim. The grounds for attachment given by our statute are many. Some of them imply no wrong on part of the defendant. Suits in attachment are common. Motions to dissolve come in almost every case, and the experience of every practitioner will testify that a large per cent. of attachments issued and levied finally fail. Attachment-liens do not with us, as in some States, require a judicial order for their creation. The mere affidavit of the creditor is sufficient, and that affidavit, too, alleging only in general term the existence of one of the statutory grounds for attachment. Hence, while it is a specific lien, it is a lien for a very uncertain claim.

Again, it would seem that no advantage would inure to the creditor, except in a mere matter of time, by sustaining such an action before the attachment and the claim are established by final judgment. So far as the creditors' security is concerned, the seizure by the officer preserves the lien as against all changes and transfers, and anything that the debtor or his assignee could do subsequent thereto, except as to perishable property and property whose keeping is expensive, no sale can be ordered until after the judgment, and for such property it would be of no

Tennent v. Battey.

advantage to sustain an action like this. Perishable property and property whose keeping is expensive demand an immediate sale, as no action can be immediately forced to trial and judgment.

“Still, again, it would seem that often the time and attention of the court would be occupied with useless litigation. At any time before the judgment the defendant may move to vacate and dissolve the attachment, inquiring, if need be, into the truth of the grounds alleged therefor; the judgment on the trial may be for the defendant, and that will end the attachment-lien. And whenever the attachment ceases, the suit brought to set aside any alleged fraudulent conveyance or encumbrance of the defendant fails also, and the whole time and labor of the court given thereto be wasted time and labor. Why should a court be subjected to this?”

Is not the language, above quoted, from Chancellor Kent, most apt? Ought not a party have a certain claim upon the property of the defendant before he attempts to inquire into the *bona fides* of the defendant's transactions, and invoke the processes of law and appropriates the time and labor of courts in the prosecution of such inquiry? And can a party, who has simply *asserted* a claim (and that is all, and attachment amounts to the mere assertion by the plaintiff of a claim), be said, in any just sense, to have a *certain* claim upon defendant's property?

We of course concede the right of the officer to defend the possession of the attached property, and in such a proceeding doubtless the *bona fides* of the defendant's acts may oftentimes be inquired into; but it does not seem to follow that because the officer may defend his possession, the plaintiff may prosecute an independent action, not to preserve the possession, but to clear up the title. Until his claim has become certain, he has no right to inquire into the title. Possession must be preserved to preserve the attachment-lien. But nothing more is necessary until the claim has been made certain. As counsel for the defendant say (we quote from their brief), the plaintiff's lien can be of no avail to them unless they obtain judgment.

Price v. Haines.

Their right to enforce the lien is derived from the judgment, and yet the judgment might not be available if the lien of the attachment was lost before the recovery. Therefore, in order to preserve their lien as a security for satisfaction of any judgment they may recover, they have the right to defend that lien against third parties claiming goods, and in that defence they have the right to show any fact that will defeat the claimant's title. If this were not so, they might, though their claim against the debtor be never so meritorious, be compelled to relinquish their security to one claiming under a title fraudulent as to them.

But there can be no reason nor necessity for them, in order to maintain their lien, to institute independent actions against third parties who may have some kind of claim on the property, yet who cannot (and are not attempting to) dispossess the plaintiff. The only right the plaintiffs have under the attachment is to use such measures as may be necessary to preserve this security until they can reduce their claim to judgment. They have no right to harass other parties with litigation that may prove fruitless, until they have first obtained the right to have a sale of the property made. When this right has been definitely settled, their lien having been preserved intact, they can then commence actions to remove obstructions in the way of their execution. But until this is done, they have no right to interfere with the claims of third parties. There can be no reason nor necessity for such a proceeding.

The judgment will be affirmed.

VALENTINE, J., concurring.

HORTON, C. J., not sitting in case.

SUPREME COURT OF MICHIGAN.

DECIDED OCTOBER, 1877.

An assignment for the benefit of creditors is void if it does not include the assignor's real estate and all his interest in it.

Price v. Haines.

The meaning of an assignment must be gathered from the whole instrument. Where an assignment was made of all one's "goods, chattels, stock, promissory notes, debts, choses in action, evidences of debt, claims, demands, property, and effects of every description, *to wit*: All the goods, chattels, and property now in the store lately occupied by the party of the first part (the assignor), and also certain other specified chattels and debts," *Held*, This did not include real estate, and that the assignment was void.

PRICE v. HAINES.

REPLEVIN for goods seized by the defendant as sheriff. On the trial, in the court below, judgment was given for plaintiff for six cents damages and costs.

C. G. Hyde, for plaintiff.

Taggart, Simonds & Fletcher, for defendant, cited the following authorities as bearing on the construction of assignments like that in this case: *Wilkes v. Ferris* (5 Johns., 344); *Rhoades v. Blatt* (16 N. B. R., 32); *Scott v. Coleman* (5 Litt. (Ky.), 349); *Rundlet v. Doll* (10 N. H., 458); *Beard v. Kimball* (11 Id., 471); Burriel on Assignments, 266.

COOLEY, C. J.—The question in this case is whether the plaintiff has shown in himself, as against the creditors of George R. Congdon, a title to goods which he claims were transferred to him by a general assignment made by Congdon for the benefit of his creditors.

At the time of the assignment, Congdon owned certain real estate liable for the payment of his debts. The assignment did not mention this, and the following is the whole of the granting and descriptive portion of the instrument: "Now this indenture witnesseth that the party of the first part, in consideration of the premises and of one dollar to him paid before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, has granted, bargained, sold, assigned, transferred, and set over and by these presents, does grant, bargain, sell, assign, transfer, and set over unto the party of the second part, his heirs, executors, administrators or assigns all and singular, the goods, chattels, stock, promissory notes, debts, *choses in action*, evidences of debt, claims, demands,

Price v. Hanes.

property and effects of every description, belonging to the party of the first part, wherever the same may be situated, to wit: all the goods, chattels, and property now in the store lately occupied by him in the village of Cedar Springs, also two pair of logging-trunks, one lumber-wagon, one buggy, one set double harness, the undivided one-fourth of an engine and boiler at Burchville, and the books of accounts lately used by me in said store, and the debts due me contained therein." Unless the terms here employed are sufficiently comprehensive to convey the real estate, the circuit judge was right in holding the assignment invalid. *Smith v. Mitchell* (12 Mich., 180.) We are of opinion that the real estate was not conveyed.

If the general terms employed in the assignment were sufficiently comprehensive to embrace real estate, they would seem to be restrained by the words which followed, and which apparently limited their force to the property particularly specified. There have been numerous decisions which have so held where, after words of grant as general as these, the assignment has proceeded to refer to a schedule attached for a more full and particular description. The construction of such instruments has been that they transferred only what was enumerated in the schedule attached; and in *Mims v. Armstrong* (31 Md., 87, 95) it seems to have been thought that had the specification followed the words of grant in the instrument, the case would have been still plainer. It would at least, we think, be equally plain. The party grants all his property, to wit, what he specifies or describes. This conclusion is strengthened in this case by the fact that the assignment is not witnessed and acknowledged so as to entitle it to record as a conveyance of realty. No doubt the title might pass without these ceremonies, but it could not be fully protected, and it is so much a matter of course that conveyances of land should be put in proper form for record, that in any doubtful case the omission to do this is entitled to weight; we must judge of its intent as a whole. *Nye v. Van Husean* (6 Mich., 329.) At best the granting part of the instrument leaves us in doubt regard-

Burrows v. Keays.

ing any purpose to convey lands, and other parts do not remove the doubt, but strengthen and confirm it.

The judgment is reversed, and judgment rendered for the defendant for the value of the goods, as appearing by the record, with interest and costs of all the courts.

The other justices concurred.



SUPREME COURT OF MICHIGAN.

DECIDED OCTOBER, 1878.

A voluntary assignment for the benefit of creditors is sufficient to pass title to the assignee, and enable him to enforce it as against the assignor, as well as others, even though it is made under a foreign Insolvent Act.

Such an assignment made in Canada may be enforced by the assignee against the assignor as to property within the United States, and trover may be maintained by the assignee against the assignor for notes detained by him after being assigned under the Canada Insolvent Law.

BURROWS v. KEAYS.

Trover for notes detained by plaintiff in error.

Error to Superior Court of Detroit.

Griffin & Dickenson, for plaintiff in error.

Atkinson & Atkinson, for defendant in error.

MARSTON, J.—Defendant in error brought an action of trover for the conversion by the defendant, plaintiff in error, of a large sum of money and certain promissory notes. Defendant, by his counsel, demurred specially to the declaration. The first cause assigned—the only one we need here discuss—was that the declaration did not with sufficient certainty set out the description of the promissory notes alleged to have been held by defendant at the time of making the alleged assignment, and on which notes recovery is sought in said court. The description in the declaration was, “divers promissory notes against sundry persons and in various amounts of great value, to wit: of the value of four thousand dollars. The declaration also in the same connection set forth that the defendant, Burrows, being lawfully possessed of these notes, executed to the

Burrows v. Keays.

plaintiff a voluntary assignment for the benefit of his (Burrow's) creditors, of all his property, goods, chattels, effects, and *choses in action*; that plaintiff accepted said assignment, and thereby became the owner of such *choses in action*; that he casually lost the same, etc.

Taking this count of the declaration, and looking at all its parts, it would appear therefrom that the plaintiff did not at any time have these notes or any of them in his possession, or that he ever had any particular information from which he could give a more minute description of them. He sets forth that they were in the possession of the defendant, and that he, the plaintiff, became owner thereof under and by virtue of a voluntary assignment made to him by the defendant for the benefit of creditors, and that the conversion took place after the assignment. The allegation of a conversion of these notes by the defendant shows them to be in possession of defendant and out of the possession of the plaintiff. What description should the plaintiff give of these notes, under such circumstances, to enable him to maintain an action of trover? He could not give the name of the maker or the date or the amount of any of them.

To require a specific description of each note, or any better or more accurate description than the one given, would be to preclude the plaintiff bringing trover at all. It is true he might set up more fully and clearly the reasons why he does not more specifically describe the property, but this would add nothing to the description given.

One object in requiring a definite description to be set forth in the declaration of the property converted, is to enable the defendant to meet the charge; but in a case like the present, where the effect and purport of the charge is a wrongful possession of the property by the defendant himself, his possession gives him the information, and it is his wrongful act in taking and retaining possession that renders the plaintiff unable to give a more full or perfect description. It may be said, however, that this reasoning presumes the defendant did wrongfully convert the notes, and that while sound enough in cases where the

Burrows v. Keays.

defendant had actually been guilty of conversion, it is unsound where the defendant is not guilty; that an innocent person from this vague general charge would be unable to meet the particular proof adduced against him on the trial, and that we have no right to presume that the defendant in this case is other than innocent of the charge made. Perhaps this is so; but, in examining and testing the sufficiency of a declaration on demurrer, we must assume the allegations in the declaration to be true, that the allegation in the declaration, alleging a loss of these notes by the plaintiff, and the finding of them by the defendant—in other words, a conversion of them by him, as in the usual form and therefore well pleaded and admitted by the demurrer, cannot be denied. The notes, therefore, for the purpose of his question, are supposed to be in the hands of the defendant, and beyond the reach or control of the plaintiff, thus rendering it impossible for him to describe them with fulness or accuracy. Under such circumstances a general description must be held sufficient, and this doctrine has been held in criminal cases where much greater accuracy is usually required. (*The People v. Holbrook*, 13 John., 90; *The People v. Kent*, 1 Dong. (Mich.), 42.)

The objections made here that the verdict was not warranted by the evidence, and that the court improperly took the case from the jury, we think are not well taken.

The evidence on the part of plaintiff consisted principally, if not wholly, of admissions made by the defendant as to the money and notes and their value. If, as now claimed, these notes, although on their face purporting to be for nine hundred dollars, may have been worthless or of little value, on account of the bankruptcy of the makers, or for other supposed reasons, we think it was incumbent on the defendant to have shown such facts upon the trial. He could not sit by and permit testimony to be introduced and submitted to the court and jury, tending to show his liability and the extent thereof, and then seek to evade the conclusion arrived at by mere speculations or guesswork. If the notes were of less value than his admission, as testified to would seem to indicate, he

Burrows v. Keays.

should have shown such fact by competent testimony. Nor do we understand, from the printed record, that the court withdrew that was contested or disputed below, from the consideration of the jury. The requests to charge, if given, would have taken the entire case from the jury. These the court declined to give, and instructed them that the plaintiff was entitled to recover.

The real question in controversy in this case, viz.: that the plaintiff failed utterly to show any title by which he could maintain the action, yet remains to be considered.

To support his title, he introduced an instrument, of which the following is a copy:

Insolvent Act of 1869.

"This assignment, made between Charles Burrows, of Wilkesport, lumber merchant, in the County of Lambton and Province of Ontario, of the first part, and William J. Keays, of the town of Sarnia, in the County of Lambton and Province of Ontario, official assignee for said County of Lambton, of the second part: witnesseth that under the provisions of the Insolvent Act of 1769, the said party of the first part, being insolvent, has voluntarily assigned, and thereby doth voluntarily assign to the said party of the second part, accepting thereof as interim assignee under said act, and for the purposes therein provided, all his estates and effects, real and personal, of any nature and kind whatsoever, to have and to hold to the party of the second part, as assignee, for the purposes and under the act aforesaid.

"In witness whereof the parties hereto have hereunto set their hands and seals, this 12th day of October, in the year of our Lord one thousand eight hundred and seventy-four.

"CHARLES BURROWS, [L. S.]

"W. J. KEAYS. [L. S.]

"Signed, sealed, and delivered, in presence of

"W. ROY."

It is insisted that this instrument was not intended as an absolute bill of sale; that it is a document made under the provisions of the Insolvent Act of 1869, "for the purposes therein provided," and that the plaintiff holds the property, as assignee, "for the purposes and under the act aforesaid," and

Burrows v. Keays.

that what these purposes are, or what title passes, without reference to the act, we have no means of knowing, and that even had the act been introduced and proven, it would have no force and would be inoperative in Michigan. This argument might be correct if plaintiff's title were derived solely under and in virtue of the act referred to. If, however, Burrows voluntarily made an assignment for the benefit of his creditors, the fact that it was made under said act, and for the purposes therein provided, would not, as between the immediate parties thereto, or as between the assignee and wrong-doers, preclude or prevent the assignee from protecting and enforcing his right to the property in any court of competent jurisdiction. The provisions of the act referred to would undoubtedly fix, govern, and control the rights, power, and duties of the assignee in the execution of trust; but in this case the court is not called upon to settle or determine any question arising under the act, or as between the assignee and the creditors of the assignor. A reference to the assignment shows that "the said party of the first part (Burrows), being insolvent, has voluntarily assigned, and hereby doeth voluntarily assign, to the said party of the second part (Keays), all his estate and effects, real and personal of any nature whatever."

This, we think, is sufficiently full and complete to transfer and pass the title to the plaintiff to the property in question, and gives him a right to come into court and enforce and protect such title as against the claims of the assignor. Any other view assuming the position of the defendant to be correct, would enable a debtor residing in Canada to send his property into this State, then make a voluntary assignment for the benefit of his creditors, and at once come here and enjoy his property, without any power in the assignee to follow him and obtain possession thereof. This branch of the case very closely resembles *Graydon v. Church*, 7 Mich., 50, where the same questions were discussed, and the conclusion there arrived at must govern and determine in this case.

The judgment must be affirmed, with costs.

The other justices concurred.

Worthy, Assignee, v. Benham, etc.

SUPREME COURT OF NEW YORK.

GENERAL TERM—FOURTH DEPARTMENT.

DECIDED JANUARY, 1878.

Where an assignment is made for the benefit of creditors under the Act of 1860, as amended in 1875, the failure of the assignee to give the bond, as required by the statute, does not invalidate the assignment. It was otherwise until the Act of 1874, but since the Act of 1875 the assignee is prohibited from selling the assigned property, or converting it to the purposes of the trust.

MORTIMER P. WORTHY, as Assignee of DAVID W. CASE, plaintiff, v. DAVID V. BENHAM, Sheriff of Ontario Co., defendant.

Metcalf & Field, for plaintiff.

Edwin Hicks, for defendant.

TALCOTT, J.—This is a motion for a new trial, after a non-suit in the Ontario Circuit, upon exceptions ordered to be heard at the General Term in the first instance. The action is for taking and detaining 6,000 hoop poles.

The plaintiff claims as the assignee of one, Dudley W. Case, under an assignment for the benefit of creditors, ratably and without giving preferences.

The assignment was dated and acknowledged the 25th day of September, in the year 1876. Case made a schedule and inventory of the assigned property, pursuant to Section 2, of Chapter 348, of the Laws of 1860. No question was made as to the form or contents of said schedule and inventory. The schedule and inventory were duly verified by Case on the 19th day of October, 1876, and filed in the office of the county clerk on the 30th of October, 1876.

The defendant justifies the taking and detaining of the goods, as sheriff of Ontario Co., by virtue of an execution in favor of one Edwin Bond, on a judgment against the assignor. Case recovered in February, 1877. The defendant alleged in

Worthy, Assignee, v. Benham, etc.

his answer that said assignment was made and accepted with intent to hinder, delay, and defraud the creditors of said Case. On the trial he gave no evidence tending to impeach the validity of the assignment except by proving that the bond required by the Statute of 1860 was not approved by the county judge or filed till the 4th of December, in the year 1876. The justice at the circuit ordered the plaintiff to be non-suited, relying on the case of *Juliaud v. Rathbone* (39 N. Y., 369). We think the circuit judge erred in directing the non-suit. The Court of Appeals held, in *Juliaud v. Rathbone*, that the neglect to file the inventory and schedule within the time prescribed rendered the assignment void; and afterward the Legislature, by the Act of 1874, Chapter 600, enacted that if the assignor omits or refuses to make and deliver the inventory or schedule and affidavit, as in the act specified, "the assignment shall not for such reason become invalid or be ineffectual." This alteration of the statute the Court of Appeals, in *The Produce Bank v. Morton* (52 How. Pr. R., 157), recognizes as an abrogation of the rule laid down by court in *Juliaud v. Rathbone* (*supra*). By the Act of 1875 the Statute of 1860 was still further amended, by providing that the assignee, in any such assignment, shall, within ten days after the delivery to the county judge of the inventory and schedule, and before he shall have power or authority to sell, dispose of or convert to the purpose of the trust any of the assigned property, enter into a bond, etc.

The statutory provision on this subject seems to intend, not that a failure to enter a bond within ten days shall have the effect to avoid the assignment, but to prohibit the assignee from selling the assigned property or converting it to the purposes of the trust until he shall have entered into such bond. Such seems to be the view the courts have taken of that provision since the case of *Juliaud v. Rathbone*. The Court of Appeals, in *Thrasher v. Bentley* (59 N. Y., 649; S. C. more fully reported in 1 Abbott's New Cases, 39), holds that even the entire invalidity of the bond does not affect the validity of the assignment. See also a decision to the same effect in the First Department (*Von Hein v. Elkus*, 8 Hun., 516).

In re Leipziger.

The non-suit is set aside, and a new trial ordered, costs to abide the event.

Present.—MULLIN, P. J. ; TALCOTT & SMITH, JJ.

NEW YORK COMMON PLEAS.

MAY, 1878.

A composition in bankruptcy does not become effective so as to discharge the debtor from his debts until the composition notes are paid, and if a note given to a creditor agreeing to the composition is not paid when due he can sue for the original debt and is entitled to his *pro rata* proportion under an assignment for the benefit of creditors, if one has been made.

The debtor made a voluntary general assignment for the benefit of creditors. Proceedings in bankruptcy having been commenced against him within three months thereafter, he made a proposal for composition, which was accepted, the resolution providing that upon *payment* of the composition the debtor's property in the hands of the voluntary assignee should be forthwith delivered to the debtor and the said assignee released and discharged from all claims against him on the part of the creditors arising out of his office. No adjudication was had against the debtor. On an application made before the composition notes were payable to remove the voluntary assignee on the ground that he had failed to file a bond, and that without filing such bond he had been selling and disposing of the estate, *Held*, that the assignment was in no way affected by such agreement of the creditors; that the assignee was not thereby relieved of his duty to file a bond, and that if he should do so and then transfer the property to the debtor he would do it upon his own responsibility if the composition is not carried out.

In re assignment of MORITZ LEIPZIGER.

APPLICATION for the removal of Frederick Lewis as assignee of Moritz Leipziger, under a general assignment for the benefit of creditors, on the ground that he has not filed a bond as required by statute, and that, without filing the said bond, he has been engaging in selling, disposing of and converting the estate, and for the appointment of a new assignee.

The assignment to Lewis was made on the 9th day of January, 1878, and was duly acknowledged and recorded according to law, and the assignee took possession of the estate on the same day. Schedules were filed by the debtor, January 26, 1878, and upon the schedules so filed the assignee's bond was fixed at the sum of twenty thousand dollars, but no bond has ever been given.

In re Leipziger

Proceedings in bankruptcy were commenced against Moritz Leipziger within three months thereafter, but no adjudication was had therein. Pending these proceedings, said Leipziger made a proposal for composition, which provided for the payment of twenty per cent. in one payment, in ninety days from the entry of the order recording the resolution to accept the composition, secured by his note endorsed by one Louis Ettinger. This proposal was duly accepted, the resolution providing that "upon the payment of the said sum of twenty per cent. as herein provided, all the property and effects of every kind and nature of the said Moritz Leipziger, the alleged bankrupt, and all the books and papers relating thereto which have come actually or constructively into the possession of Fred. Lewis, assignee for the benefit of creditors, and all right, title, claim and demand whatsoever which the said Fred. Lewis, assignee as aforesaid, may have therein or thereto shall revert to the said Moritz Leipziger, the alleged bankrupt, and the said property, assets, books, papers and effects shall forthwith be delivered to said Moritz Leipziger, such alleged bankrupt, and the said Fred. Lewis, assignee for the benefit of creditors, shall thereupon be forever released and discharged from any claims against him on the part of said creditors arising out of such office and his duties in connection with the estate of the said Moritz Leipziger, the alleged bankrupt."

Upon this application an order was granted on the 21st day of March, 1878, requiring the said Frederick Lewis to show cause why he should not be removed from acting as such assignee, and a temporary injunction was also granted restraining him from interfering with the estate.

Upon the return of the order to show cause it was contended by the assignee that in view of the provision of the resolution of composition above cited, it was not necessary to file a bond.

Chamberlain, Carter & Eaton, for the petitioner.
C. A. Runkle, for the assignee.

In re Leipziger.

DALY, C. J.—My conclusion on this application is that the composition is a proceeding distinct and different from the proceedings for a discharge in bankruptcy, and that the construction which has been given by the United States Courts to the law respecting the one does not necessarily apply to the other; that the composition does not become effective so as to discharge the petitioner from his debts until the composition notes are paid, and if a note given to the creditor agreeing to the composition is not paid when due, he can sue for the original debt and is entitled to his *pro rata* proportion under an assignment for the benefit of creditors, if one has been made. (*Edwards v. Hancher*, L. R., 1 C. P. D., 111; *Edwards v. Coombe*, L. R., 7 C. P., 519; *Newell v. Van Praagh*, L. R., 9 C. P., 96.)

What was held in *Miller v. Mackensie* (13 N. B. R., 496, 2 W. Dig., 205), upon which the assignor relies is, that where the creditors agreeing to the composition were all paid, and the creditor had been tendered the sum paid to each of the creditors agreeing to the composition, and he had refused to take it, his debt was extinguished, and that a writ of attachment sued out by him to enforce his debt should be quashed, which is not the present case. Nothing has been done in this case but to give notes for the composition, which may never be paid. The composition provided for by the Act is a *pro rata* payment or satisfaction in money. (Section 5103.) The creditors in this case agreed to take notes payable in three months with a certain person as endorser, but until these notes are paid there has not been a *pro rata* payment or satisfaction in money. It has been simply an agreement on the part of the creditors to give the debtor time to effect the composition, and it is not effected until the notes are paid. The creditors taking these composition notes also agreed that the assignee under the State law might surrender and deliver up to the debtor all property received by him under the assignment, and waived notice of any proceedings he might take to be discharged from his liability as assignee. It does not follow from this that we are called upon to relieve the assignee from giving the bond required to perfect his title to the property. If he does not file a bond

The First National Bank of Newark v. Holmes et al.

within the specified time, the court has power to remove him, to make provision for the safe custody of the estate, and the appointment of another assignee. (Laws of 1877, Chap. 466, Sec. 6.)

If he files it, and then transfers the property assigned to him to the debtor, he does it upon his own responsibility if the composition is not carried out and effected. So far as this court is concerned, he must file his bond or be removed. After he has done so, he must act upon his own responsibility and that of his sureties if he considers himself justified in delivering up the assigned property to the debtors.

Whether the extinguishment of the debts by the payment of the composition notes will have any effect upon an assignment made within three months of the filing of his petition by the debtor for the discharge of his debts, upon an agreement of the requisite number of his creditors to accept a composition, is a question I am not now called upon to decide. What I do decide is that the assignment is in no way affected by what has in fact taken place—an agreement of the requisite number of creditors to receive endorsed notes for the *pro rata* amount agreed upon, and their agreement that the assignee may deliver up the assigned property to the assignor.

SUPREME COURT—PENNSYLVANIA.

OCTOBER, 1877.

An assignment for the benefit of creditors vests the title in the assignee forthwith, although he may be ignorant of the assignment.

A trust does not fail for want of a trustee. It is valid whether the assignee ever accepts the trust or not.

THE FIRST NATIONAL BANK OF NEWARK v. HOLMES, LAFFERTY & CO., Garnishees. SIMON MARKS, Appellant.

Before AGNEW, C. J., SHARSWOOD, MERCUR, GORDON, PAXSON, WOODWARD, and STERRETT, JJ.

The First National Bank of Newark v. Holmes et al.

Appeal from the Court of Common Pleas, No. 2, of Alleghany Co., of Oct. and Nov. Term, 1877, No. 37.

This appeal was by Simon Marks, assignee of Jacob Needy, from the decree of the court, confirming the report of the auditor appointed to distribute a fund paid into court by Holmes, Lafferty & Co., garnishees of said Jacob Needy.

Marks was the assignee under a deed of voluntary assignment for the benefit of creditors, made by Jacob Needy and dated at Pittsburgh, July 22, 1875.

On that same day the plaintiff, The First Nat. Bank of Newark, Ohio, had caused an attachment under the act of March 17th, 1869, to be issued against said Jacob Needy, by virtue of which the defendants below, Holmes, Lafferty & Co., were summoned as garnishees.

Josiah Cohen, for appellant.

McCreery & Bailie, for appellee.

Mr. Justice Sharswood delivered the opinion of the court. As to the question discussed by the learned auditor in the court below of the right of the assignee in this case to intervene and claim the fund, we think the authorities cited by him do not apply.

It is true that he stands in the shoes of the assignor as to all transactions before the assignment. He could not set up the fraud of assignor in any previous transfer or judgment. He does not represent the creditors who may have superior claims, and he is not armed with their powers. (*Twelves v. Williams*, 3 Whart., 492; *Vandyke v. Christ*, 7 W. & S., 373.) Nor can he appeal from a decree distributing the trust funds in his hands, unless he is personally aggrieved. (*Mellon Appeal*, 8 Casey, 121.) But he has a perfect right in virtue of the assignment, and as a trustee for the creditors, to assert his and their right to any property of the assignor which passed by the assignment against any person claiming by subsequent transfer attachment, judgment, execution, or any other lien.

This brings us at once to the real ground of this controversy—Which was prior in time, the assignment or the attachment?

The First National Bank of Newark v. Holmes, et al.

The learned auditor, admitting that the assignment was executed, acknowledged and left for record in the office of the recorder of deeds before the writ of attachment was into the hands of the sheriff, was of the opinion that because there was no evidence that it was accepted by the assignee before the service of writ, the attachment must prevail against the assignment. In this we think there was manifest error.

It will be unnecessary to discuss the general question of what constitutes a general delivery of a deed, or to examine or compare the numerous decisions reported in the books upon this subject. We have a case in this court upon the execution of an assignment for the benefit of creditors, which was fully considered, and is directly in point. (*Read v. Robinson*, 6 W. & S., 329.) It was there held that a common law conveyance, given to an agent for transmission to the grantee, vested the title in the grantee forthwith, though ignorant of the transaction, and that so far as an assignment in trust for the benefit of creditors is concerned, the express refusal of the assignee to accept would not invalidate it. Chief-Justice Gibson says: "The Act of 1836 provides that the several courts having jurisdiction shall have power to appoint assignees or trustees where any sole assignee or trustee shall renounce the trust or refuse to act under or wholly execute the same." Now, a trust depending for its existence on the assent of the trustee to the grant in which it is declared, is, when renounced, in the very category defined to the first member of the clause; for it is a rule to which there is said to be no exception, that there is no renunciation after acceptance, and consequently after assent to the grant of the legal estate. We do not think that it ought to be any longer an open question in this State since *Read v. Robinson*, and the subsequent cases of *Blight v. Schenck* (10 Barr., 285), and *Johnson v. Herring* (10 Wright, 415), that the moment an assignment for the benefit of creditors is placed by the assignor or any one interested, in the office of Recorder of Deeds of the proper county and within the prescribed time, the beneficial interest of creditors, the *cestuis que trust*, are certainly and completely vested, and it is totally immaterial when

Keevil et al. v. Donaldson.

the assignee accepts the trust or whether he ever accepts it at all. In *Blight v. Schenck* Mr. Justice Rogers said that the delivery was complete when the grantors declared before the proper officers that they signed, sealed, and delivered the deed without saying or doing anything to qualify the delivery, is well settled on authority. If the grantee had been at the time either personally or by agent, no person would doubt that the title was vested; but it is ruled that this will not prevent it taking effect as a good deed. (*Garmons v. Knight*, 5 B. & C., 671; *Lloyd v. Bennett*, 8 C. & P., 124. In *Johnson v. Her-ring*, Mr. Justice Strong says: "A trust does not fail for want of a trustee. A delivery of an assignment is good when the instrument has passed out of the control of the assignors with their assent to its taking effect. Delivery, though necessary to give effect to any deed, is an act done after, in common language, the deed has been made or executed. The evidence of it may rest entirely in parol. It is not usually attended with any publicity, and if in case of voluntary assignments it is necessary to look beyond the deeds themselves to know when they became operative, a wide door is open for establishing secret trusts, which it was the manifest purpose of the legislature to restrain. Nor is there any hardship in adopting such a construction. The assignment may be placed upon record by the assignor, or by any one having a legal or beneficial interest.

Decree reversed at the cost of the appellees, and now it is ordered that the fund in court, four thousand one hundred and three dollars and fifty-seven cents, be awarded and paid to the appellant, Simon Marks, as assignee for the benefit of the creditors of Jacob Needy.

SUPREME COURT OF KANSAS.

JANUARY, 1878.

Where an assignment for the benefit of creditors is made by a firm whose liabilities are less than the assets, and the deed of assignment contained a clause conditioned that the assignee proceed under it, unless the indebtedness of the firm can be paid or settled with otherwise, etc. *Held*,

Keevil et al. v. Donaldson.

That the assignment was made with the intent to hinder and delay creditors, and was void.

A court has no power to make a new deed of assignment any more than a new contract between parties.

J. C. KEEVIL et al. v. J. V. DONALDSON.

Error from Linn District Court.

Sheffield & Kelly, for plaintiffs in error.

J. S. Bentley, for defendant in error.

HORTON, C. J.—The question at issue is whether the assignment of Joseph McComb and E. F. Duncan, of the firm of “McComb & Duncan,” to the defendant in error, in trust for the creditors of said firm, is valid. If valid, the judgment of the court below must be affirmed; if void, the judgment must be reversed. The first and leading objection to the assignment is that the special clauses in the instrument to the effect that the assignee shall take possession of the property transferred to him, sell and dispose of the same with all reasonable diligence, either at public or private sale, for the best prices that can be obtained therefor, and convert the same into money, “unless the indebtedness of the said Joseph McComb and E. F. Duncan, partners as aforesaid, can be paid or settled otherwise by amicable arrangements between the creditors of the said McComb & Duncan,” etc., . . . “and out of the proceeds of such sale, if any be made,” etc., render the assignment void. The difficulty in the case arises from the doubts of the insertion of these special provisions and their proper interpretation. But an examination of all the instrument and the facts developed on the trial *aliunde*, the instrument that the total indebtedness of the firm at the date of the assignment was only five hundred and ninety-six dollars and forty-one cents, and the amount and value of the assets of the firm was six hundred and fourteen dollars and eighteen cents, lead us to the conclusion that there was an *intention* in executing the deed to hinder and delay the creditors; that this intent was actually entertained by the debtors; and not only that there was such *actual* intent, but

Keevil et al. v. Donaldson.

that such intent was a fraudulent one. It appears to us that it was anticipated by the making of the assignment, that the creditors would be forced into some compromise or settlement of their claims, and that when the assignment had accomplished its purpose of releasing the firm from the immediate payment of their debts, or had resulted in having the creditors take the property and effects in satisfaction of their claims by *amicable arrangement* between themselves, it was expected the mission of the deed would be accomplished. In such an event there would be no sale, and indeed nothing further for the assignee to do. The assignment was to have effect if no "amicable arrangements" between the creditors could be made; if such arrangements were made, then there was to be an immediate end to the assignment. The laws of the State in relation to assignments were to be disregarded, and the estate closed up by the creditors either with the assignors or assignee regardless of the express provisions of the statutes. It was a plan to tie up the property to induce a settlement with creditors. A power to assignees to compound with all or any of the creditors in such manner and upon such terms as they should deem proper, was regarded in a leading case in New York as peculiarly objectionable, and one that was impossible to sustain. *Wakeman v. Grover*, 4 Paige, 247; same case on appeal as *Grover v. Wakeman*, 11 Wend., 187. In Illinois, a clause in a general assignment authorizing the trustee to compound with the creditors renders it void. *Hudson v. Maze*, 4 Ill., 578. If it was intended in any way by these special provisions in the deed of assignment to reserve to the assignors any power or control over the property assigned by it in the event as an amicable arrangement among the creditors, their effect is equally fatal. Powers of this kind "poison it throughout." Counsel for the defendant in error, fearing the constructions which may be given in these special clauses, attempts to parry any injury to the deed of assignment with the argument that our statute prescribes the duty of the assignee, who becomes and is an officer of the court, and must carry out the assignment as required by the statute without regard to the provisions of the instrument, and, in sub-

In re Assignment of Horsfall.

stance, when an assignment is once made, however fraudulent or void upon its face, it is cured by the operation of the assignment law. Not so. The court has no right to make a new deed of assignment any more than a new contract between parties. The fact that the assignment may be construed in opposition to the requirement of the general assignment laws is an additional argument of its invalidity. If an assignment is made for the benefit of creditors, and thereby an insolvent's property is unconditionally and unreservedly transferred to an assignee, with a general authority to the latter to receive, hold, and dispose of it for the equal benefit of all creditors, the Statutes of the State provide and regulate the assignee's conduct, etc. But when an assignment is void owing to its fraudulent conditions or from a purpose of hindering, delaying, and defrauding creditors, the law gives it no aid or assistance, and when properly attached by a creditor it has no power or force either within itself or from the authority of the assignment act. This view renders it unnecessary to consider the other objections made to the assignment.

The judgment of the district court will be reversed.

All the justices concurring.

N. Y. COMMON PLEAS.

GENERAL TERM—DECIDED FEBRUARY, 1879.

Where, after an assignment for the benefit of creditors, a composition deed is obtained from creditors by an assignor, the assignee cannot reassign the property and be discharged from the trust on consent of some of the creditors and the assignor without a regular accounting under the statute.

In the Matter of the Assignment of JOHN H. HORSFALL to JOHN W. HESSE.

John H. Horsfall, after making an assignment to John W. Hesse for the benefit of creditors, obtained from his creditors a composition deed, discharging him on payment of twenty-

In re Assignment of Horsfall.

five per cent. of their respective claims. The deed provided that upon such payment the assignee might reassign to the assignor, and an order be entered without notice that the assignee be discharged and his bond cancelled. Hess, the assignee, who was a creditor to the amount of ten thousand dollars, agreed to sign the composition deed upon a verbal assent by Horsfall and a large creditor named Briggs to a waiver of a public accounting. Horsfall acceded to the demand of Hesse that an order be entered discharging him before he would reassign the property and before the creditors were paid. This being done, Hesse paid over six hundred and forty-one dollars to meet a settlement requiring over two thousand dollars. Horsfall discovered that Hesse had retained in his possession over six hundred dollars, had paid extravagant fees to his lawyers and otherwise mismanaged the estate. Judge Larremore, upon application of John T. Camp, a creditor, who, though he had signed the composition deed, was not a party to the verbal agreement between Horsfall and Hesse, vacated Judge Van Brunt's ex parte order discharging Hesse.

From this order Hesse appealed.

Louis C. Waehner, for appellant, Hesse.

George C. Lay, Jr., for respondent, Camp.

DALY, C. J.—The order vacating the order discharging the assignee should, in my opinion, be affirmed. The statute has provided for the mode in which an assignee in an assignment for the benefit of creditors, under the statute, where there has been a composition between the assignee and his creditors, may be discharged; which is on a proceeding for an accounting under the act (Laws of N. Y., 1877, Chap. 466, Sec. 20). It was, undoubtedly, as the appellant claims, within the power of the creditors to waive the accounting, for a party may waive any provision of law, or statutory or constitutional enactment designed for his benefit or protection.

But the creditors in this case have not by the composition deed waived an accounting. The assignor and the creditors,

In re Assignment of Horsfall.

Briggs & Harris, who together brought about the composition, did so with the assignee, and the application of the assignor Horsfall, and of Briggs, to vacate the order discharging the assignee, was denied by Judge Van Hoesen, in the case of Briggs, upon the ground that he had, by the verbal agreement, waived his right to accounting. But the petitioner Camp was no party to this verbal agreement, and is in no way concluded by it. He is simply one of the creditors who signed the composition; and all that they agreed to was that an order might be made by any judge of this court, discharging the assignee without notice to them.

The assignee was entitled, under this agreement, to apply to any judge of this court for his discharge, without notice to the creditors who signed the composition deed; but the only mode in which the court had power to discharge him was upon proof of the composition in a proceeding for an accounting. When the creditors consent that an order may be made by any judge of the court discharging the assignee, they necessarily mean discharging him without any notice to them in the manner prescribed by law, there being no other way in which a judge could discharge him.

To constitute a waiver the consent should have been without any accounting.

The ex parte order, therefore, discharging him, was irregular and was properly vacated.

It was provided by the composition deed that after the execution and delivery of it the assignee might, after paying all claims and demands against the assigned estate which, as assignee, he was liable to pay, and after deducting two hundred dollars for his fees, reassign to Horsfall, the assignor, the property, of whatever nature or description, which might be in his possession under the assignment.

This is very clear from the instrument—that he was to do this before he had the right to apply to a judge of the court to be released and discharged from his trust.

The composition creditors had agreed to release and discharge the assignor from all liability upon the payment by him.

In-re Assignment of Horsfall.

of twenty-five per cent. of the amount of their respective claims, and the reassignment of the assigned estate to him by the assignee, as provided for in the instrument, was clearly necessary to enable the assignor to carry out the composition; for it is to be assumed, as this was a general assignment of all the debtor's property for the benefit of creditors, that he had nothing to enable him to pay the compounding creditors until the property was restored to him by a reassignment; and this is sworn to have been the fact by the assignor and by Briggs, who was one of the principal creditors.

But the *ex parte* order discharging the assignee was made with the consent of the assignor before a reassignment of the property; and was for that reason alone irregular. This was not a provision which the assignor could waive, except so far as his rights were concerned.

The composition creditors had rights also. It was for their interest that the assignor should be enabled, as speedily as possible, to carry out the composition, as the payments were to be made in about a month after the execution of the composition deed; and the assignor could not, without their consent, agree so as to bind them that the assignee might be discharged before reassigning the property. The provision in the composition deed ratifying and confirming all the acts, transactions, payments, and proceedings of the assignee means when he had complied with the conditions of the deed by reassigning the property, and is in a position to procure his discharge in the mode provided by the statute. From the facts disclosed, an accounting in this case was necessary, as the assignee, if he has done what is alleged, has impaired the estate and lessened the ability of the assignor to comply with the terms of the composition. The opinions delivered by Judges Van Hoesen and J. F. Daly, in the assignment cases of Cottlon, Yeager, Doyer, Lowenthal, and by Judge Van Hoesen in the application of Horsfall & Briggs, in the present case, show how essential and indispensable it is that there should be an accounting in every case, and that it cannot be dispensed with unless there has been a clear, distinct; and undoubted waiver of it by every creditor

 Whitcomb et al. v. Fowle et al.

who could in any way be affected by the assignee's discharge, which was not the case here.

I do not think that it affects the question whether the petition may have been tendered the amount of the composition or not if the discharge was irregular. He was not, as Briggs was, concluded by any agreement on his part to waive an accounting, and had the right to bring the matter before the court, it being the duty of the court to see that the rights of all the creditors are protected before discharging the assignee.

The order therefore should be affirmed.

Judge Van Brunt, who writes a dissenting opinion, holds that as Camp has released every claim he has against the assigned estate, and has formally released, by an instrument under seal, the assignor from each and every claim he has against him, cannot be heard in this matter.

Judge J. F. Daly, who concurs with the chief justice, says the interest of Camp is that he is to be bound by such unauthorized decree, and he is not barred from claiming that the judgment cutting him off is not authorized by law.

N. Y. COMMON PLEAS

SPECIAL TERM.—DECIDED FEBRUARY, 1879.

A general assignment by a limited copartnership cannot give a preference to the special partner for the amount of his investment.

As between the parties to an assignment it is binding and revokable at their pleasure, but such revocation cannot in any way prejudice or impair the rights of creditors.

A creditor, although he has not obtained judgment, may file a bill in equity to restrain insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver.

JOSHUA M. WHITCOMB et al. against JOSIAH F. FOWLE et al.

Prior to January 2, 1879, a limited copartnership existed under the firm name of "J. F. Fowle," of which the defendant Josiah F. Fowle was the general and the defendant Wm. A.

Whitcomb et al. v. Fowle et al.

Brown, Jr., was the special partner. On the day last mentioned the said firm made an assignment for the benefit of its creditors to the defendant John H. Folk, in which the amount due the special partner was made a preferred claim. This action was then commenced in behalf of the plaintiff and other creditors who might come in and contribute to the expense thereof, to have the assignment declared null and void; that a receiver of the copartnership property be appointed, and that an injunction issue restraining any disposition of such property. An order to show cause as to the appointment of a receiver and the granting of an injunction was made January 7, 1879, returnable January 8, 1879, the hearing of which was on that day adjourned to January 13, 1879, with the direction that no disposition of the property by sale was to be made by Folk, the assignee.

On January 7, 1879, Fowle (as appears by his affidavit) was served with the summons and complaint and the order to show cause in this action. On January 9, 1879, with the consent of Brown, Folk reassigned the copartnership property, and on the same day the said firm, with Brown's consent, made a new assignment to Folk for the benefit of its creditors generally, and without preference. Folk, as such assignee, subsequently filed the schedule required by law and executed a bond which was duly approved.

Folk then opposed this motion to appoint a receiver, and for an injunction.

LARREMORE, J.—If this were an action in the nature of a creditor's bill, the plaintiffs would have no status in court without alleging the recovery of a final judgment and execution issued and returned thereon. (*Geery v. Geery*, 63 N. Y., 252, and cases there cited.)

But I do not understand that the doctrine laid down in *Innes v. Lansing* (7 Paige, 583) has been disturbed or disputed. That case holds that when a limited partnership becomes insolvent, its assets are a special fund for the payment of its debts ratably (except those due to the special partner), and

In re Assignment of Leahy.

any creditor, although he have not proceeded to judgment and execution at law, may file a bill in equity to restrain the insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver. This practice was reviewed and approved in *Van Alstyne v. Cook* (25 N. Y., 489).

If the plaintiffs have asked for more or greater relief than the court can afford them on a final judgment, that is no reason why the court on a mere motion should try issues upon the determination of which they may be entitled to some relief. If as general creditors they cannot (as contended) contest the validity of the assignment, yet as general creditors they may have the right to prevent a dissipation of the copartnership assets.

The authorities cited by the counsel for the defendants (*Hone v. Woolsey*, 2 Edw. Ch., 289; *Mills v. Arghal*, 6 Paige, 577; *Metcalf v. Van Brunt*, 37 Barb., 621) establish the theory that as between the parties to it the assignment is binding and revokable at their pleasure. But no case goes to the extent of holding that such a revocation could in any way prejudice or impair the rights of creditors. In the case under consideration the creditors had commenced proceedings to protect their rights upon a statement of facts which should not be decided on affidavits.

Considering the hopeless insolvency of the firm, that its indebtedness to its special partner would almost, if not entirely exhaust its assets, the peculiar relations of the assignee and the special partner, and also the entire merits of the application to remove the receiver and vacate the injunction, I think it should be denied.

N. Y. COMMON PLEAS.

SPECIAL TERM—OCTOBER, 1878.

When an assignment becomes void because no inventory is filed within thirty days after the execution of the assignment, as required by the statute of 1877, no trust based upon the assignment as a valid instrument can be enforced.

In re Assignment of Leahy.

In such case the assignee cannot be called upon to account under the statute for property which came into his hands. An accounting may be had in a suit in equity.

A petition for the removal of an assignee in such case denied.

In re Assignment of LEAHY to STOTESBURY.

Petition for removal of assignee and an accounting, presented by the creditors of the assignor.

J. F. DALY, J.—The General Assignment Act of 1877 (section 3, subd. 5) provides and declares that in case an inventory shall not be made and filed within thirty days by the debtor or the assignee, the assignment shall be void. This express enactment cannot be disregarded nor limited. An assignment declared void is as if it had never been. There are no longer assignors or assignees. If the person named as assignee have property which he received under the void instrument, he has no title to it; it may be seized on process against the assignors, and its proceeds in the "assignee's" hands may be reached by appropriate actions by any creditor. But no trust based upon the assignment as a valid instrument can be enforced, because the assignment does not exist. Proceedings under the General Assignment Acts of 1877 and 1878, affirm the existence of an assignment, and if there be no assignment the proceedings cannot be maintained.

Such is the position of the parties before me. The assignment of James Leahy to Henry H. Stotesbury, was dated and made on December 11, 1877, pursuant to the statute first cited. The assignee accepted the trust pursuant to the first section of the statute. But no inventory or schedule was ever filed by the debtor, or by the assignee, pursuant to the third section of the act. It followed that after thirty days, or on January 11, 1878, the assignment was void. This left the title of all the property in the assignor. He sold it afterwards by a regular bill of sale to the assignee, who secured or paid to the creditors of the assignor a composition of thirty per cent. The petitioning creditors did, not as they claim, join in the agreement for thirty per cent., and now claim the right to call the assignee to

Mumper, Administratrix, etc., v. Rushmore, Sheriff, etc.

account. This cannot be done under the general assignment acts as before stated. If Stotesbury be a trustee for the creditors, under the assignment by which he took the estate, an accounting may be had by suit in equity.

It is claimed by the petitioners that the effect of the act of 1877 is to make the assignment void as to creditors, but to leave it valid as between the parties to it. No such limitation is to be found in the statute. Where such an effect is intended, as in the Statute of Frauds, appropriate language is used to express the intention. In this case the enactment is general and absolute.

The statute of 1878 (General Assignment Act amended) does not help the case, as the assignment became void before the latter statute was passed.

Petition denied.*

SUPREME COURT—NEW YORK.

GENERAL TERM—SECOND DEPARTMENT.

SEPTEMBER TERM, 1878.

A general assignment for the benefit of creditors passes any interest which the assignor had in goods, although not in his possession or under his control.

A delivery of the property to the assignee is not essential to the validity of a general assignment.

Where the sheriff has taken a debtor's goods under execution against him, and he subsequently makes a general assignment, it is valid, and will transfer the debtor's interest to the assignee therein, subject only to the lien of the execution.

MARY A. MUMPER, Administratrix, &c., v. BENJAMIN F. RUSHMORE, Sheriff, &c.

APPEAL from a judgment in favor of defendant entered upon the dismissal of the complaint at circuit.

P. S. Crooke, for the appls.

John J. Armstrong, for the resp't.

* See matter of Farnam, ante, p. 127, as to the effect of the amendment of 1878, in subsequent assignments.

Mumper, Administratrix, etc., v. Rushmore, Sheriff, etc.

GILBERT, J.—The nonsuit in this case was clearly right. Before the plaintiff's attachment was issued, the debtor in the attachment had made an assignment of all his property to an assignee upon trust to pay his debts. When this assignment was made, the property assigned was in the custody of the sheriff, under a levy under an execution in favor of another creditor, which had been issued prior to the assignment. The sheriff testified that he levied only upon goods sufficient to satisfy the execution, but we think his acts amounted to a levy upon all the goods.

The assignment, therefore, transferred the interest of the assignor in the goods, subject only to the lien of the execution which was first issued, and it was effectual for that purpose. In such a case the actual change of the possession of the assigned property is not necessary. The deed transfers the title as between the parties to it, and the non-change of possession does not render the assignment void, as to the creditors of the assignor, for the reason that by the common law, and the statute in affirmance thereof, it is the retention of possession by the assignor, and not merely the non-delivery to the assignor that is made the evidence of fraud in the transaction. If the assignment be of an interest in goods not in the possession of the assignor or under his control, an actual delivery thereof is not required. (2 R. S., 136, § 5, *Klinck v. Kelly*, 63 Barb., 623; *Ball v. Loomis*, 29 N. Y., 412.)

The plaintiff has not the right to require the sheriff to enforce the attachment against the assigned property notwithstanding the assignment without indemnifying him.

The judgment must be affirmed with costs.

BARNARD, P. J., concurred; DYKMAN, J., not sitting.

The Converseville Company v. The Chambersburg Woolen Company et al.

SUPREME COURT—NEW YORK.

GENERAL TERM.—SECOND DEPARTMENT.

SEPTEMBER TERM, 1878.

A consignment of goods by a consignor to a factor for sale for the account of the consignor upon a *del credere* or any other kind of commission, does not divest the consignor of the title to his goods, and the property in the proceeds follows that in the goods.

Where consignees make a general assignment for the benefit of creditors, the consignors are entitled to all the goods and the proceeds thereof which come into the hands of the assignee.

The title of the consignors are not divested by reason of the assignment, notwithstanding for an extra commission the consignees guaranteed the payment of the price of the goods sold.

The Supreme Court has concurrent jurisdiction with the County Court to compel assignees to account under the Statute of 1877.

THE CONVERSEVILLE COMPANY, Appellants, v. THE CHAMBERSBURG WOOLEN COMPANY, CYRUS W. HOLMES, Jr., Justice J. ELLIS and Others, Respondents, and JOHN L. HILL, Assignee, &c., Appellant.

Appeal from an order made on an accounting under the General Assignment Act of 1877.

Sidney S. Harris, for the appellant.

Asa A. Spier, for the respondents Holmes and Ellis.

GILBERT, J.—The principle asserted from the order appealed from, as I understand it, is that the parties in this action who consigned goods to Thomas & Co. to sell upon a *del credere* commission are respectively entitled to the proceeds of the goods so consigned which are in the hands of Mr. Hill, the assignee of Thomas & Co. That principle I think is unquestionably correct; Mr. Hill holds the fund in controversy as the assignee of Thomas & Co., by virtue of a general assignment made by the latter for the benefit of their creditors. The fund is the result of collections made by Mr. Hill, as such assignee of debts due from the purchasers of the goods so con-

The Converseville Company v. The Chambersburg Woolen Company et al.

signed, and the portion of the moneys so collected which was paid on account of the goods consigned to Thomas & Co., by each assignor, can be readily and certainly ascertained. The parties who consigned the goods respectively are entitled to the proceeds of the sales of the same goods. Thomas & Co. are merely the factors of their principals, the consignors of the goods. The relation of principal and agent existed between them for advances which were made by Thomas & Co. to the consignors, the former had a lien only, nor did the fact that, for an extra commission, they guaranteed the payment of the price for which the goods were sold, in any manner alter the title of the goods or to the proceeds thereof. The general property in the goods always remained in the consignors, and the proceeds of the sales thereof, so long as they can be traced or identified, also belong to them. Unsold goods and the proceeds of sales were however subject to the lien of the factor, for advances and commissions (See Hare & Wallace, Am. Lea. Co., 802), where this subject is discussed and the authorities are collated (*Francklyn v. Sprague*, 10 Hun., 589.) It is not necessary to discuss the question whether the fiduciary character of an agent attached to Thomas & Co. I think it did. But the question here is whether the goods mentioned were their property or the property of the consignors. It seems to me to be too plain for argument, that a simple consignment of goods by a consignor to a factor for sale for the account of the consignor upon a *del credere* or any other kind of commission, cannot operate to divest the consignor of the title of his goods. On the contrary, while the goods are in the possession of the factor, he is the bailee of his principal, and the consignor may revoke the authority of the factor at any time and reclaim the goods consigned to him which remain unsold, upon payment of the factor's unpaid advances and commissions. The primary engagement and duty of the factor is to sell the goods and render an account.

The factor's contract of guaranty is a cumulative security to his principal, and I cannot see that it works any other change in the legal relations between them.

The Converseville Company v. The Chambersburg Woolen Company et al.

Without pursuing the subject further, the position of the general creditors of Thomas & Co. on this point ought not to be sustained. The property in the proceeds follows that in the goods. The assignee stands in the shoes of his assignor, and certainly is entitled to no greater or different interest in such proceeds.

It is claimed, on behalf of the plaintiffs, that Thomas & Co. from time to time unlawfully appropriated moneys which were the proceeds of the plaintiff's goods, in making advances to other consignors of goods to Thomas & Co., and that the plaintiff's are entitled to have such moneys refunded out of moneys belonging to said other consignors in the hands of the assignee.

I do not perceive how that claim can be sustained. The plaintiffs may have an action for money had and received against persons who receive from Thomas & Co. moneys which belonged to them, but no facts have been stated which would warrant the court in declaring that a lien on the goods of such persons or on the proceeds thereof, exists in favor of the plaintiffs. The plaintiffs must first establish their debts against such persons respectively, and then exhaust their legal remedies for the recovery of them. After that has been done they may acquire such a lien. The power granted by the Statute to the County Court to order assignees to account and to make distribution among creditors, is not exclusive, but concurrent only. If the legislature were competent to take away any part of the general jurisdiction of the Supreme Court, they have not attempted to do so in this instance. The order should be affirmed without costs.

DYKMAN, J., concurred in the result. Present, BARNARD P.J., GILBERT and DYKMAN, J.J.

Wilson v. Berg.

SUPREME COURT—PENNSYLVANIA.

DECIDED JANUARY, 1879.

An assignment for the benefit of creditors can be impeached only for fraud in the assignment, or at the time of making it, so as to have attached to the instrument or affected its operation.

The acts and declarations of the assignor are evidence to impeach it only in so far as they prove he has unduly controlled or changed the legal effect of the assignment.

An assignment may be fraudulent although all the forms of law are complied with, but if it be made in the form or manner provided by law, and duly recorded so as to pass all the property of the assignor, the motive existing in his mind cannot affect its validity, the fraud that is forbidden arises from acts done contrary to law or equity.

WILSON v. BERG.

ERROR to the Court of Common Pleas of Butler County.

David Kelley, who had for over thirty years carried on the business of merchandising and farming in Buffalo township, Butler County, Pa., on December 7, 1875, sold a farm to David Henry and Jacob Fry for thirteen thousand dollars. Of this sum two thousand dollars was credited as payment of a debt due the purchasers. The balance, eleven thousand dollars, was paid in the following manner: Guffy and others had given a mortgage to Fry upon which a judgment had been entered for eleven thousand dollars. In some unexplained manner, David Henry had obtained an interest in the judgment, and pursuant to an agreement between them and Kelley, Fry, by Kelley's directions, assigned the judgment to Alexander Mitchell. On December 13th and 14th, and subsequently, judgments were entered against Kelley to the amount of about fifty thousand dollars. On December 14th Kelley made a general assignment of all his effects to Allen Wilson, for the benefit of his creditors. John Berg & Co., a judgment creditor, treating the assignment to Wilson as void, issued execution, and levied upon Kelley's personal property. A rule was granted on Kelley and his assignee to interplead, and an issue directed, in which Berg & Co. were plaintiff and Allen Wilson, assignee, defendant, in which the plaintiff alleged that the assignment was void, as being made to hinder, delay, and defraud creditors.

Wilson v. Berg.

On trial it appeared that the property sold constituted the greater part of Kelley's assets; that no consideration passed from Mitchell to Kelley; that a declaration was made by Mitchell some time afterwards on the docket, of a trust for the First National Bank of Butler, of which he was cashier, and to which Kelley was indebted to a large amount. Mitchell was not shown to have been present when the judgment was assigned to him, and it was not shown that the declaration was executed in pursuance of a previous agreement. Verdict and judgment for the plaintiff.

The opinion sufficiently indicates the errors assigned, and whether sustained or otherwise.

McCandles & Greer, Esqs., for plaintiff in error.

Lewis Z. Mitchell, Esq., for defendants in error.

Opinion by MERCUR, J.—Filed January 6th, 1879.

This was an issue to try the validity of an assignment made by David Kelley to the plaintiff in error. The defendant alleged it was made fraudulently, with intent to hinder, delay, and defraud the creditors of the assignor.

The assignment was general, and for the benefit of all his creditors. It was regularly executed and acknowledged, and duly recorded on the same day. The entire good faith of the assignee is conceded. The effort is to impeach it by evidence of the acts and declarations of the assignor. His acts and declarations are undoubtedly evidence in so far as they prove he has unduly controlled, or changed the legal effect of the assignment. Beyond that they are not evidence. The statutory intent given to the assignment is to pass to the assignee all the property, of every kind, which the assignor owned at the time of the assignment. A preference, on the face of the assignment of any creditor, other than those preferred by Acts of Assembly, would be void. An agreement with the assignee, at the time of its execution, that any of the property, which legally or equitably, ought to pass by the assignment, should be excluded from the inventory, and be left for the benefit of

Wilson v. Berg.

the assignor, would be fraudulent. This, because the assignment itself would be contrary to the statute. If, prior to the assignment, the assignor had fraudulently conveyed or concealed any of his property, such acts would not impair the validity of a general assignment subsequently made. If the conveyed or concealed property can be recovered by the assignee, it should be for the benefit of creditors. If he cannot recover it, then any creditor may pursue it in like manner as if the general assignment had not been made. The subsequent assignment does not condone any previous misconduct of the assignor. The Act of 1836 permitted preferences in assignments. The Act of 1843 declared preferences void, except as to claims of laborers. It has however been held that the confession of a judgment to one creditor, just before making a general assignment, and with a view of preferring such creditor, did not defeat the prior lien which he thereby acquired to the prejudice of other creditors. (*Blakesley's Appeal*, 7 Barr., 449; *Worman v. Woolfersberger's Executors*, 7 Harris, 59.) Hence, although the intention of the debtor was to remove from the operation of the subsequent assignment a portion of his estate, and his conduct produced that result, yet the validity of the assignment is not thereby impaired. The preference was not in and by the instrument, through and by means of which the debtor surrendered to his creditors all dominion over his property, *Id.* No law compels a debtor to make an assignment for the benefit of his creditors. It permits him so to do, and directs as to its effect when done. Prior to such action, except as against a Bankrupt Law, he has an undoubted right to prefer any of his creditors, by a conveyance or transfer of property, or by a confession of judgment, although he may thereby hinder, or forever prevent his other creditors from collecting their just demands. In case of a general assignment, the law contemplates that the assignor shall pass over all his estate of every kind, which he then owns. When that is done the assignment is in accordance with law, and the effect given to it by law cannot be in fraud of any of his creditors. Although the claims of some of his creditors may be ripe for execution,

Wilson v. Berg.

and the debtor have property out of which they might be collected, yet an assignment by which they will receive only a *pro rata* share with other claims not overdue, works no legal fraud. The fraud that is forbidden arises from acts done contrary to law or equity. It usually results from a disregard of proper forms, or, if they be observed, from doing the acts with the intention of reaching a result not sanctioned by the authorities. As the law implies no fraud in a debtor transferring property to one creditor, to the exclusion of his other creditors, before an assignment, and with a view of making it, so no inference of fraud in the assignment can arise from a transfer at any time; of all the property he then has, for the benefit of all his creditors. The policy of the law regulating assignments is, that the property of an insolvent debtor shall be divided among all his creditors rather than pay some in full, and others nothing. So effectual is an assignment for the benefit of creditors that if it be placed by the assignor, or any one interested, in the office of the recorder of deeds of the proper county, within the prescribed time, it takes full effect, although the assignee is ignorant of it or refuses to accept the trust. Marks' Appeal, 4 Norris, 231.

If an assignment be made in the form and manner provided by law, and duly recorded, so as to pass all the property of the assignor, we cannot see how the motive existing in his mind can affect its validity. If in morals the motive be a bad one, yet in law it produces no forbidden result. In so far as it hinders or delays creditors, it is a lawful hindrance and delay, and cannot be held fraudulent. The commission of a lawful act is not made unlawful by the fact that it proceeded from a malicious motive. (*Jenkins v. Fowler*, 12 Harris, 308; S. C., 4 Casey, 176; *Glendon Iron Co. v. Uhler*, 25 P. F. Smith, 467; *Smith v. Johnson*, 26 *Id.*, 191.)

The conduct of the assignor, which the learned judge appears to have thought the strongest evidence of fraud, was a separate and distinct transaction occurring one week before the assignment was executed. It was the sale of a valuable tract of land to persons to whom he was indebted in a sum much less

Wilson v. Berg.

than he received for the land. There was also some evidence tending to prove his fraudulent concealment of the residue of the purchase money. We think, however, that an assignment for the benefit of creditors can be impeached only for fraud in the assignment, or at the time of making it, so as to have attached to the instrument or affected its operation. An erroneous view of the bearing of this transaction on the validity of the assignment pervades the whole charge and controlled all the rulings of the court.

As an assignment may be fraudulent, although all the forms of law are complied with, the first, sixth, and ninth assignments are not sustained. Nor do we discover any error in the recital or the evidence covered by the fourteenth assignment.

The general rule is that when part of a record is given in evidence the whole shall be received; yet the rule is not so inflexible as to apply in all cases. It was stated by the judge, and not contradicted by the evidence, that the declaration of trust by Mitchell, although on the docket, was executed long after the assignment of the judgment to him. As he is not shown to have been present when that assignment was executed, and the declaration of trust is without date, and is not shown to have been executed in pursuance of a previous agreement, we cannot say there was error in its rejection. It appears that all other parts of the record were afterwards given in evidence. The twentieth assignment is not sustained.

All the remaining assignments partake of one common error, and in so far as the alleged errors are in conflict with this opinion the assignments are sustained.

Judgment reversed, and a *venire facias de novo* awarded.

AGNEW, C. J., dissents.

Bassett v. Fahey.

CIRCUIT COURT OF PEORIA COUNTY—ILLINOIS.

DECIDED JANUARY, 1879.

A voluntary assignment, at common law, by a debtor, for the benefit of his creditors, if fairly made and accompanied by possession, will prevail over executions subsequently issued, unless there be something in the recent legislation to render it void.

Under the recent act relating to voluntary assignments, the making of the inventory of assets and list of creditors, and annexing them to the deed, are not conditions precedent to the taking effect of the deed so as to pass title to the assignee, nor are they necessary parts of the deed.

Upon the execution and delivery of the deed of assignment, it becomes valid and binding between the parties, and good as against execution creditors, although no bond be filed.

Where possession accompanies the deed of assignment, such deed is not void as to creditors, although not acknowledged and recorded as required by the law relating to voluntary assignments.

MARK M. BASSETT v. THOMAS FAHEY.

McCULLOCH, J.—This is an action of replevin brought to recover certain articles of jewelry claimed by plaintiff under a deed of assignment dated July 2, 1877, made by James A. Hutchinson for the benefit of his creditors, which the defendant, as constable of Peoria County, levied upon by virtue of an execution, dated on the same day as the assignment.

No question is made as to the validity of the execution, nor that it became a lien upon the property of Hutchinson from the time it came into the hands of defendant, as constable, which time the proof shows to have been at 9 o'clock A.M. of the day of its date.

Nor is any question made as to the good faith of the assignment, any further than that both plaintiff and Hutchinson, at the time of the execution of the deed of assignment, knew of the pendency of the suit, and that judgment was about to be rendered in the case wherein said execution was issued. This fact alone does not prove the assignment to have been fraudulent as to creditors.

It appears from the evidence that Hutchinson had been contemplating the making of an assignment for several days previous to the second day of July, and possibly the papers were prepared before that date, but its actual execution and

Bassett v. Fahey.

delivery took place early in the morning of that day. The day preceding this transaction, the act of May 22, 1877, concerning voluntary assignments, came in force, but it appears in proof that the attention of the assignee was not called to the same until some time during the same day, but after the execution came into the hands of defendant. It was therefore not in the mind of either Hutchinson or the plaintiff at the time to follow the provisions of that statute.

It is in proof that plaintiff took possession of the property in question, claiming title under said assignment, at the hour of 8 o'clock A.M., on the second day of July, so that if his title under said deed is a good one it takes precedence of defendant's title by about one hour.

The act of May 22d came in force July 1, 1877. At the time plaintiff took possession of the property in question, several plain provisions of this act had not been complied with.

The debtor had not verified by his oath the schedules of creditors and assets attached to the deed; he had not acknowledged the execution of the deed, nor had it been recorded; the assignee had not filed in the office of the county clerk any inventory and valuation of the property coming into his hands by virtue of said assignment, nor had he entered into any bonds for the faithful performance of his duties as such assignee: Session Laws 1877, 116.

Both plaintiff and Hutchinson rested in the belief that they had done all that the law required them to do. It cannot, therefore, be charged upon them that they, or either of them, intentionally omitted any duty imposed upon them by the law.

It is now contended, on the part of the defendant, that, notwithstanding plaintiff's possession, these omissions render the deed of assignment void as to defendant, and that having acquired a valid lien before the statute had been fully complied with, in the foregoing particulars, he has a right to retain the same, by virtue of his levy.

The proof further shows, that on the same day of the assignment, plaintiff's attention was called to the provisions of the

Bassett v. Fahey.

act of May 22d, and that thereupon he immediately set about complying with its terms. He procured the affidavit of Hutchinson to be annexed to the schedules already attached to the deed of assignment. He also procured the acknowledgment of Hutchinson to the execution of the deed, to be duly certified thereon by a notary public. No objection has been urged to these instruments for deficiency in form or substance. Plaintiff also prepared an inventory and valuation of the estate so far as the same had come to his knowledge, which, having been duly verified by his own oath, he filed in the office of the clerk of the County Court, and then and there executed a bond as required by the statute, and took the receipt of the clerk therefor. No objection is taken to these papers for defect, either in form or substance. These documents were all executed, and (so far as necessary, to be filed in the clerk's office) were filed on the 3d day of July. The deed also bears the file mark of the county clerk, dated July 3d, but it was not filed for record in the recorder's office until the 6th day of August.

It is now too late to say, nor is it claimed, that a voluntary assignment by a debtor for the benefit of his creditors is, in itself, void. It is also settled that where such an assignment is fairly made, and possession accompanies the deed, it will prevail over executions subsequently issued, unless there be something in recent legislation to render it void. This point is decided by the Supreme Court in a case very similar to the one at bar: *Willson v. Pearson* (20 Ill., 81), followed and approved in *Myers v. Kinzie* (26 Ill., 36).

It is now claimed that under the act of May 22, 1877, no deed of assignment, whether accompanied with possession or not, can take effect as against creditors until the provisions of that act have been fully complied with, up to and including the filing of the bond by the assignee.

The point thus raised is one of very grave importance, and requires for its solution a close examination of the statute in question, and a careful comparison thereof with other statutes in force.

By the first section it is provided: "That in all cases of

Bassett v. Fahey.

voluntary assignments hereafter made for the benefit of creditors, the debtor or debtors shall annex to such assignment an inventory, under oath or affirmation, of his, her, or their estate, real or personal, according to the best of his, her, or their knowledge, and also a list of his, her, or their creditors, their residence and place of business, if known, and the amount of their respective demands: but such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees the title to any other property not exempt by law, belonging to the debtor or debtors at the time of making such assignment, and comprehended within the general terms of the same."

It is very evident that the making of the inventory of assets and the list of creditors and annexing the same to the deed, are not conditions precedent to the taking effect of the deed, so as to pass title to the assignee, nor are they necessary parts of the deed; for it is provided in the eighth section: "That no assignment shall be declared fraudulent or void for want of any list or inventory, as provided in the first section of this Act."

The same section then goes on to provide for a compulsory disclosure on the part of the debtor, of the condition of his estate, the names of his creditors, and the amounts due to each, with their places of residence.

It is objected that the deed of assignment is void because the assignee had not, at the time the execution came to defendant's hands, entered into bonds as provided by law for the faithful execution of his duties as such assignee.

By Section 3 of said Act it is provided "That the assignee or assignees shall also forthwith file with the clerk of the County Court, where such assignment shall be recorded, a true and full inventory and valuation of said estate, under oath or affirmation, so far as the same has come to his or their knowledge, and shall then and there enter into bonds to the people of the State of Illinois, for the use of the creditors in double the amount of the inventory and valuation, with one or more sufficient sureties to be approved by the said clerk, and the said clerk shall give a receipt therefor, and the assignee or as-

Bassett v. Fahey.

signees may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment as respects the collection of debts and the sale of real and personal estate."

By Section 12, it is provided that: "In case any assignee shall fail or neglect, for a period of twenty days after the making of the assignment, to file an inventory and valuation, and give bonds as required by this act, it shall be the duty of the county judge of the county where such assignment may be recorded, on application of any person interested as creditor or otherwise, to appoint some one or more discreet and qualified person or persons to execute the trust embraced in such assignment; and such person or persons, on giving bond with sureties, as required above, of the assignee or assignees named in such assignment, shall possess all the powers thereby, and by this act conferred upon such assignee, and shall be subject to all the duties hereby imposed, as fully as though he or they are named in the assignment," etc.

By reading these two sections in connection it will be perceived that certain acts are to be performed by the assignee under the deed of assignment before he is required to file his bond. He must make an inventory and a sworn valuation of the estate, so far as it has come to his knowledge. Upon this valuation the amount of the penalty of his bond is fixed. The making of the inventory and valuation necessarily presupposes an acceptance of the trust. A deed of assignment, like every other deed, in order to pass title to the assignee, requires a delivery by the grantor and an acceptance by the grantee. In this instance the assignee accepted the trust in writing by uniting with the debtor in the signing of the deed. A delivery of the deed to him after such signing imposed upon him the duty to proceed with the execution of the trust. The deed cannot be recorded as an executed deed until its delivery, either actually or constructively. But the taking possession of the deed by the assignee, and assuming to act under it, amounts to an actual acceptance of the trust. The making of an inventory and valuation necessarily precede the execution of the

Bassett v. Fahey.

bond. An acceptance of the trust therefore necessarily precedes the filing of the bond by the assignee.

The first point to be determined is at what time the title as between the parties to the deed passes to the assignee. A reading of the 3d Section alone would seem to indicate that, for the purpose of taking possession of the estate, preliminary to the making of the inventory and valuation, the title passes to the assignee; and that he be allowed a reasonable time thereafter within which to perfect the title, so as to enable him to collect debts and sell the property of the debtor. We might well stop here in the discussion of this point, for it appears from the evidence that the assignee used all reasonable diligence, after acceptance of the deed, in making and filing this inventory and valuation, and in executing his bond as required by law. His acts in this respect being within a reasonable time, must be held to relate back to the execution of the deed.

But a much more potent reason is found in Section 12. Irrespective of the statute, by an acceptance of the deed, the assignee becomes the trustee of all the creditors, and any subsequent renunciation on his part does not affect the validity of the conveyance.

(Burrill on Assignments, Ch. 24.) Now if it be the intention of this statute to postpone the taking effect of the deed until a bond is filed, no trust is created until that has been done, and no rights become vested in the creditors. The deed may therefore be revoked by the debtor, for it is in the nature of a deed of assignment that it may be revoked at any time before rights have become vested in it. (Burrill on Assignments, Ch. 34.)

But in Section 12 it is provided, that if the assignee shall fail or neglect, for a period of twenty days after the making of the assignment, *to file an inventory and valuation, and give bond as required by law*, it shall be the duty of the county judge to appoint a proper person to execute the trust, who shall likewise file an inventory, and give bonds in like manner as the grantee in the deed. Now if the title does not pass out of the

Bassett v. Fahey.

debtor until the inventory and bond are filed, then the debtor has it in his power, in case the assignee appointed by the county judge is not acceptable to him, to defeat the operation of Section 12 *in toto*, by a revocation before the new trustee has filed his bond.

The evident intent of Section 12 is to preserve the trust for the benefit of the creditors, and for this purpose the assignee has twenty days in which to file his inventory valuation and bond. If at the end of that time he has failed to comply with the law in this respect, the county judge may appoint some one to execute the trust. The statute therefore preserves the trust for the benefit of creditors, although no inventory, valuation, or bond be filed by the first assignee.

The deed is therefore valid and binding between the parties, from the time of its execution and delivery, although no bond be given, and must be held good as against execution creditors, unless some other fact intervenes sufficient to render it fraudulent and void as to them. In Missouri, where a statute very similar to this one is in force, the law is so held. (*Hardcastle v. Fisher*, 24 Mo., 70.)

It is further objected that this deed is void as to defendant, because at the time the execution came into his hands as constable, it was neither acknowledged nor recorded. By Section 1 of the Act in question it is further provided that: "Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside, or where the business in respect of which the same is made has been carried on; and in case the assignment shall embrace lands or any interest therein, then the same shall be recorded in the county or counties in which said land may be situated."

If this provision were to be interpreted without reference to any other legislative enactments it would be somewhat difficult to determine the exact meaning of the language employed. What is an acknowledgment? Before what officer must it be taken? How shall it be certified? Is the acknowledgment an essential part of the deed? What is the purpose of record-

Bassett v. Fahey.

ing the deed? What effect is the recording of the deed intended to have by way of notice to third parties? Does the recording of the deed dispense with the necessity of taking possession of personal property, and so vest title thereto wherever situated in the assignee? Does the deed, by being recorded in the county of the debtor, become effectual to pass the title to personal property, wherever situated, while as to real estate the title becomes vested in the assignee, only when recorded in the county where the land lies?

These questions and many others that might be suggested this statute leaves unanswered. We must therefore look elsewhere for its true interpretation.

Section 28, Ch. 30, R. S. 1874, on conveyances, requires all deeds concerning real estate to be recorded in the county where the land is situated. Section 31 provides that deeds relating to realty, recorded, although not acknowledged according to law, shall be notice to subsequent purchasers and creditors. Several other sections of the same statute provide the manner and form of acknowledgments to which special reference need not be made. Applying the foregoing provisions to the deed in question it would take effect as to lands so as to be good as against creditors, only when recorded in the county where such lands are situated, but although not acknowledged according to law, it would be notice from the time of its being recorded. There appears to be no good reason why these provisions should not apply to the deed in question. It is however the uniform ruling of the Supreme Court that if possession be taken under a deed to real estate, it need not be either acknowledged or recorded.

There appears, however, to be this difference between deeds of real estate and those relating to personal property. While a deed of real estate, although not acknowledged according to law, may be recorded, and so become notice to creditors, there appears to be no statute authorizing the recording of a deed relating to personalty without its being duly acknowledged.

As already seen, a deed of personalty made in good faith,

Bassett v. Fahey.

accompanied with possession, is good against creditors not having a lien, at the time of the change of possession, but it is also true that unless possession accompanies the deed it is *prima facie* at least void as to creditors. The object of recording deeds of personalty is therefore to provide in certain instances for the vesting of an interest in the grantee, although he may not acquire the immediate possession.

Does the acknowledgment then become an essential part of the deed? As already observed, there is no statute authorizing the recording of a deed of personalty unless it be duly acknowledged. So far, therefore, as the efficacy of a deed as to personal property depends upon its being recorded, it must also be acknowledged; for by Section 30, Ch. 30, R. S. 1874, it is provided that: "All deeds, mortgages, and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."

The deed in question being one authorized by law to be recorded, it must, as to the personalty, be adjudged void as to creditors and subsequent purchasers without notice, until it shall be duly acknowledged and recorded. This is the plain import of the language of the statute. But the acknowledgment of the deed is only a pre-requisite to its being recorded. That ceremony does not add to the force of the instrument as a common law deed, nor does the want of it detract anything from its efficacy as such. In the case of a married woman's deed the acknowledgment under the old laws was held to be an essential part of the deed. The reason was that she being by common law disabled from making a deed, derived her power to do so wholly from the statute, and by that statute she was required to acknowledge her deed. It was therefore held that without her acknowledgment her deed was void. In this case the grantor is by common law capable of making a deed with-

Bassett v. Fahey.

out an acknowledgment, and therefore if there be no statute rendering his deed invalid unless acknowledged, the courts cannot hold his deed to be void.

It is, however, insisted that this being a voluntary conveyance for the benefit of creditors, and without consideration, is fraudulent and void as to creditors, unless the deed is recorded. The ground of objection seems to be that the Legislature having undertaken to legislate upon a subject of such vital interest, it must be presumed they intended to cover the whole ground, and that therefore when the statute says that such deeds must be recorded, it follows by necessary implication that unless recorded they are void. It might be a sufficient answer to this position to say the statute has not so declared, and have no right to add to the statute.

But as already observed, this statute evidently had reference to the existing laws upon the subject of acknowledging and recording deeds. If this is a voluntary conveyance without valuable consideration, what says the law as to the necessity of its being recorded? (On the subject of voluntary conveyances being subject to existing liens see *Willis v. Henderson*, 4 Scam., 13; *Goodwin v. Mix*, 38 Ill., 115; *Dole v. Olmstead*, 41 Ill., 344; *O'Hara v. Jones*, 46 Ill., 288.) Section six of the Statute of Frauds (R. S. 1874, 541) provides that: "Every conveyance of goods and chattels, on consideration not deemed valuable in the law, shall be taken to be fraudulent, unless the same be by will duly proved and recorded, or by deed in writing duly acknowledged or proved and recorded, as in the case of real estate, or unless possession shall really and *bona fide* remain with the donee."

What the effect of the statutes in question may be upon personal property not actually reduced to possession, it is not necessary for us now to decide. In this case the possession having accompanied the deed, it is very evident it is not rendered void by the Statute of Frauds. Chap. 95, R. S., relative to chattel mortgages, provides that no chattel mortgage not accompanied with possession of the property, shall be valid as against third persons, unless acknowledged and recorded as

Fowler v. Cornish.

therein provided. The statutes now quoted seem to be the only ones bearing upon the question at issue. Not one of them in terms renders this deed void if the creditor had notice thereof. The uniform course of decisions in this State, is that possession under a deed is notice of the possessor's title, whether the property be real or personal.

In the absence of any statute to the contrary, I am bound to hold the decisions in *Wilson v. Pearson* (20 Ill., 81), and *Myers v. Kinzie* (26 Ill., 36), conclusive of this question.

The finding of the court will therefore be for plaintiff upon the issues joined.

SUPREME COURT OF MINNESOTA.

FILED FEBRUARY 28, 1879.

The right to impeach or set aside a mortgage which is fraudulent and void as against the creditors of the mortgagor does not pass to an assignee of the mortgagor by a voluntary general assignment in trust for the benefit of creditors, subsequently executed and unaffected by any statute in force at the time.

The assignee's relations to the creditors are solely those created by the instrument of assignment under which he holds. He only represents them in respect to their rights and interests under the assignment, and not as to those rights belonging to them independent of its provisions.

MARK D. FOWLER, Respondent, v. W. D. CORNISH,
Appellant.

APPEAL from an order of the District Court, County of Ramsey, denying defendant's motion for a new trial.

H. A. Castle & E. C. Palmer, for respondent.

H. L. Williams & W. D. Cornish, for appellant.

CORNELL, J.—The rights of the defendant in respect to the property in controversy are those of a voluntary assignee holding under a written general assignment in trust for the benefit of creditors, unaffected by any statute in force at the time of its execution.

Fowler v. Cornish.

None of the rights which he has thus acquired can be enlarged, abridged, or altered by any subsequent legislation, for, under the Constitution, no one can be deprived of property or any interest therein except by "due process of law." So far, therefore, as any question here is concerned, the act of February 14, 1877 (Ch. 67, General Laws 1877), cited by appellant, has no application; for the assignment under which he holds was made on the 15th day of February, 1875, and the rights of the assignee thereunder, whatever they were, had become vested and fixed, and even adjudicated in the District Court long before the statute was passed.

Respecting their rights, they were such, and such only, as the instrument of assignment purported to transfer, and as the assignor had the legal capacity to transfer to his assignee. He could transfer no other or greater interest in any property than what he himself possessed and had the right to enforce. His assignee could acquire no other. His title being solely a derivative one under the assignment, he can assert and enforce no claim or right thereunder which his assignor could not legally have enforced had no assignment been made.

The mortgage to the plaintiff from Taylor, the enforcement of which by the former it is the purpose of the defendant in this action, as the assignee of Taylor, to prevent, was executed and delivered long prior to the execution of the assignment under which the defendant claims. It was undoubtedly good as between the parties thereto, and created a valid lien on the property in question, which plaintiff could lawfully have enforced against Taylor. Whether it was made for a fraudulent purpose, that rendered it inoperative and void as against the creditors of Taylor, is a circumstance of no importance in this case, for they alone can question its validity on that ground. They have this right, not as beneficiaries under the assignment, or by virtue of any of its provisions, but as the creditors of Taylor, without any reference to the assignment, and wholly independent of it.

Taylor could not assert this right nor transfer it to his assignee, as he could not transfer what he did not have; nor

 Assignment of Bryce et al. to Lewis.

can his assignee set up any such claim on behalf of the creditors as a trustee holding property for their benefit, and therefore a representation of their interests. His relations to the creditors are solely those created by the instrument of assignment of which he holds. He only represents them in respect to their rights and interests under the assignment, and not as to those rights belonging to them independent of its provisions. In the views of the court below on this point, as expressed in its opinion accompanying the order denying a new trial, we entirely concur, as being correct in principal and fully sustained by the authorities cited. (Burrill on Assignments, 2d Ed., 358; *Brownell v. Curtis*, 10 Paige R., 210; *Leach v. Kelsey*, 7 Barb., S. C. R., 466; *Browning v. Hartbid*, 95; *Andrews v. Roberts*, 18 J. R., 526; *Estabrook v. Messersmith*, 18 Wis., 572.)

In respect to the defendant's claim set off, it is sufficiently answered in the opinion of the District Court: "The plaintiff was seeking in this action only to recover the proceeds of the mortgaged property, and after deducting the full amount due from the Huntington notes the amounts of those proceeds is still sufficient to pay the residue of his claim." The motion for a new trial was properly denied, and the order appealed from is affirmed.



NEW YORK COMMON PLEAS.

SPECIAL TERM, JANUARY, 1879.

An order for the examination of witnesses, and the production of any books and papers by any party or witness, or the assignee under Section 21 of the Act of 1877, Chap. 466, may be had at any time, and is not necessarily confined to cases where a proceeding under the Act is pending.

An inspection made without an order made on petition gives no right to file with the County Clerk abstracts from the books, nor to use them in proceedings under the Act.

*Matter of Assignment of BRYCE & SMITH to
FREDERICK W. LEWIS.*

MOTION by Nat. Park Bank, creditor, to set aside order of December 24, 1878, by which an order for the production of books, &c., was vacated.

Assignment of Bryce et al. to Lewis.

J. F. DALY, J.—The order of December 13, 1878, directing the examination of Alfred D. Griswold, and directing the assignee to produce all books of account, papers, and vouchers of the assignor, was authorized by the facts stated in the petition then presented to the court. The 21st Section of the Act (Chap. 466, Laws of New York) authorizes the county judge at any time, on the petition of any party interested, to order the examination of witnesses, and the production of any books and papers, by any party or witness before him, or before a referee appointed by him for such purpose. This may be done "at any time," and it is not necessarily confined to cases where a proceeding under the Act is pending. The statute provides that the testimony and extracts from the books and papers shall be filed with the County Clerk, to be used at any action or proceeding then pending, or which may be hereafter instituted. The provision is evidently designed for the obtaining of depositions, perpetuation of testimony, and the inspection of books and papers for use in any of the various proceedings that grow out of the administration of the assigned estate. Although the statute does not prescribe the proof necessary to authorize such order, it is clear that a necessity for the examination should be shown by the petition, otherwise the assignee might be perpetually obstructed in the administration of the trust, by applications in which the books of the assignors and the assignee's time might be wholly engrossed by examinations instituted by petitioning creditors. The petition presented in this case alleged that the Park Bank is a creditor of the assignors to the amount of \$18,314.60; upon nine notes indorsed by the assignors, and discounted by the Park Bank about June, 1878; that at that time the assignors represented to plaintiff that they were perfectly solvent, and worth \$273,600 over all their liabilities; that on July 23, 1878, they made this assignment; that their schedules were filed September 27, 1878, showing a total indebtedness of \$352,979.59, and actual valuation of assets at \$121,411.61; that the assignee employed an accountant, Mr. Alfred D. Griswold, to prepare a balance-sheet of the estate from the books, and that such sheet was inspected by an

Assignment of Bryce et al. to Lewis.

expert employed by the bank, who was of the opinion, from casual inspection, that either of the representations of the assignor in June, 1878, were untrue, or the balance sheet was incorrect; that requests to inspect the books were made by petitioners, who were, however, put off by excuses, and the petitioners charge a fraudulent concealment by the assignors of assets of the firm. The charge was grave; a *prima facie* case was made out, and the entertainment of the truth was not only of importance to all persons interested in the assigned estate, but would aid materially in carrying out the purposes of the Assignment Act. Judge Van Hoesen, therefore, on December 13, 1878, made an order requiring the accountant, Alfred D. Griswold, to appear and be examined before a referee, and requiring the assignee to produce on such examination the books and papers of the assignors. Mr. Griswold was evidently a "witness" within the meaning of Section 21, and as the assignors were parties, their books and papers were under the control of the court or judge. The examination under Section 21 is itself "a proceeding," and every person interested in the estate who is required to submit to examination, or to produce books or papers, is "a party" to the proceedings. In a broader sense, however, the assignors, assignees, creditors, and sureties are "parties" to all the proceedings under the Assignment Act.

On December 24, 1878, however, Judge Van Hoesen granted *ex parte*, an order vacating the order above mentioned. This was done on motion of the assignee, who presented to the court an affidavit denying that he ever refused to allow an inspection of the books; setting forth that there had been three meetings of the creditors, at which the bank was represented; that an advisory committee of creditors had been appointed, which fully examined all the books and papers of the assignors; that forty-five per cent. had been offered in settlement at a meeting on September 10, 1878, and a composition agreement to that effect signed by the bank on the 29th of August, 1878; a petition in bankruptcy against the assignors was filed by certain creditors, and that proceedings thereunder are still

Assignment of Bryce et al. to Lewis.

pending ; and that a proceeding for composition was instituted, and a meeting called for January 10, 1879, before *Henry Wilder Allen*, Register in Bankruptcy ; that there was a recommendation of composition in bankruptcy at thirty-five per cent. by a committee of the creditors, and finally stating among other matters, that the petitioner's proceedings was intended merely to harass and annoy the assignee and debtors, and to coerce the debtors into giving better terms to the bank than to other creditors.

It is manifest that Judge Van Hoesen was justified in setting aside his order for the examination of Griswold and production of the books, upon the fact coming to his knowledge that proceedings against the debtors were pending in the United States District Court in Bankruptcy, a fact which had not been disclosed in the petition of the bank. He regarded it as proper to permit no step that required his order or approbation to be taken after the United States Court had taken cognizance of the matter in bankruptcy.

There seems to be no other reason that this discovery of the pending bankruptcy proceedings, which would require the judge to vacate peremptorily and without notice to the petitioner his previous order. The other matters stated in the affidavit of the assignee were such as would suggest the propriety of calling on the petitioner for answer, but not of vacating *ex parte* the order granted on the petition.

That this was the matter which operated to produce his decision would appear from the third order made by the judge, dated December 27, 1878, requiring the assignee to show cause why the order of December 24, 1878, should not be vacated and the examination originally directed be had. This last order to show cause was granted on a voluminous affidavit of Mr. Worth, president of the Park Bank, setting forth, among other things, that an injunction which had been issued by the United States District Court, staying all proceedings before the referee, had been modified by said court, after full hearing and argument, so as to allow the examination of the assignor's books and papers to proceed. The other matters

Assignment of Bryce et al. to Lewis.

set out in Mr. Worth's affidavit were in support of his original petition.

I regard the facts before the court as sufficient to authorize the examination originally ordered under Section 21. The United States District Court has expressly declined to interfere with that examination, and this court is bound in all proper cases to allow such remedies to the creditors as the act provides, and as do not conflict with the paramount authority of the bankruptcy court over the same assets.

Much proof has been offered on this motion upon an issue which seems to me of minor importance; viz., whether a demand for inspection was made upon the assignee, and whether he refused it. If it were necessary upon the question, I should say that he is by no means convicted of an attempt to obstruct creditors, and that he could not be so convicted upon the affidavits against him, some of which are open to severe criticism. But it is not necessary under Section 21 to allege or prove a demand and refusal of inspection in the petition. It is of no importance in considering the propriety of granting the prayer of the petition. That assignee is and always has been willing to permit the inspection prayed for.

An inspection without an order made on petition gives no right to file with the County Clerk extracts from the books, nor to use them in proceedings under the act. An order must be obtained for the purpose, and the application for it involves no reflection upon the assignee.

The main reason for the inspection of the books of these assignors yet remains, that, as set out in the petition on which the order of December 13th was made, the representations alleged to have been made by the assignors as to their solvency, less than two months before the assignment, were such as to excite surprise when their schedule of assets is examined, and the creditors are not unreasonable in their demand for an investigation. No denial by the assignors of the alleged representations is made, although Mr. Bryce makes an affidavit on this motion, and I am justified in believing that a well-founded distrust of the accuracy of the schedules is the ground of the

Fuller v. Steiglitz, Assignee.

petitioner's desire to examine the assignor's books, not a malicious desire to embarrass the debtors, nor corrupt design to extort a payment to the bank over and above the composition proposed by the creditors generally. I shall therefore direct that the order of December 24, 1878, be vacated, and the examination under the order of December 13, 1878, be proceeded with.

No costs.

SUPREME COURT—COMMISSION OF OHIO.

DECEMBER TERM, 1875.

A general assignment of property by an insolvent debtor for the benefit of creditors, in conformity to the laws of the State of New York, where such debtor resided and did business, operates to transfer the right of action to recover said property to the assignee, and he may maintain an action as such assignee in the courts of any other State to collect the same. This is so, although said assignment as authorized by the laws of New York gives preference to certain of the creditors, which is not authorized by the *lex fori*.

In case of such an assignment the law of the domicile of the assignee controls and determines what is a sufficient transfer to authorize the assignee to collect the same.

The principles of comity between States will allow such assignee to maintain an action in the courts of another State against one of its citizens to collect the same, notwithstanding such preferences in the absence of any set-off, or other defence in such action, or of any lien or charge against said claim under the laws of such State by the debtor.

S. A. FULLER v. *M. A. STEIGLITZ*, Assignee.

ERROR to the District Court of Cuyahoga County.

J. E. INGERSOLL, for plaintiff in error.

The doctrine of comity does not require a sovereignty to aid in enforcing a contract made without its jurisdiction, which contravenes its own public policy, or is injurious to the interests and rights of its own subject. (Story on Con. of L., Sec. 244, 259; 2 Kent's Com., 455; 2 Parsons' Con., 82; *Ingraham* v. *Geyer*, 13 Mass., 146; *Guillauder* v. *Howell*, 35 N. Y., 657.)

As to the set-off in this case, see 35 N. Y. cited above. (*La*

Fuller v. Steiglitz, Assignee.

Chevelier v. Lynch Doug., 170; 40 N. H., 237; 5 Cranch, 298; *Follett v. Buyer*, 4 Ohio St., 591; Waterman on Set-offs, Secs. 395-398.)

The policy of the law of Ohio is averse to assignments, giving preferences. (1 S. & C., 712, Sec. 16; 2 S. & C., 925, Sec. 26; *Ib.*, 981, Sec. 99.)

(This case being decisive of *Benedict v. Steiglitz*, the argument of counsel in that case is given here.)

Estep & Burke, and *Prentiss & Vorce*, for defendant in error.

On the question of set-off the court is referred to Bur. on Assig., 438, 439; 2 Kent's Com., 700, n. b.; *Morgan v. Bank of N. A.* (8 Ser. & R., 72); *Stewart v. Anderson* (6 Cranch., 203); *Aldrich v. Campbell* (4 Gray, 284); *Bigelow v. Folger* (2 Met., 225); *Myers v. Davis* (32 N. Y., 493); *Greenlander v. Howell* (35 N. Y., 657); *Dorsheimer v. Busher* (7 Ser. & R., 9.)

P. P. Ronney for defendant in error, on the question of set-off, cited 37 N. Y., 396; *William v. Brown* (2 Keyes, 486; 1 Handy, 338; 5 Ohio St., 59); and claimed that the laws of New York govern his case. (Story on Con. of L., Sec. 558.)

JOHNSON, J.—In the Common Pleas, Steiglitz, assignee of J. Smal, brought an action on an account of \$968.75 for goods sold by Smal October 9, and November 3, 1866, on a credit of six months. Smal was a resident of and doing trade in the State of New York, and becoming insolvent made an assignment of certain property, including this account, on the 11th of December, 1866, in trust for creditors, giving certain preferences as allowed by the laws of that State. The defendant, a citizen of Ohio, makes no formal objection to the plaintiff's capacity to sue as such assignee. He makes no defense to a recovery of the amount claimed, but seeks to have set-off a cross-demand which he holds. This set-off is placed on two separate grounds.

(1) He says that after contracting this debt to Smal, he purchased, and in due course of business, a promissory note on Smal which became due December 19, 1866, for \$1,806; that owing

Fuller v. Steiglitz, Assignee.

to the preferences given in the assignment the estate will not pay exceeding ten per cent. to the general creditors, and he asks that so much of this note as is necessary be applied to cancel the plaintiff's demand.

(2) If this cannot be done, he then, for the reason stated, asks for a reference to a master to inquire and state an account of the amount *pro rata* share as a creditor among creditors, and to have his *pro rata* share as a creditor holding said note offset against the plaintiff's action. The court charged that neither of said defenses constituted a cross-demand, and gave judgment for plaintiff, which was affirmed by the District Court.

This presents two questions.

(1) As neither the account sued on, or the note set up, was due at the time of the assignment to plaintiff, could the defendant's prospective cause of action be defecked as a set-off by the assignment?

(2) As the assignment preferred creditors, but was valid by law of New York, where made, will the courts of Ohio apply the principles of comity and allow a recovery of the claim by the assignee under the circumstances stated in defendant's answer? Neither cause of action was due at the date of transfer. There is no connection between the two claims. They did not grow out of the same transaction, nor is the note in any way connected with the account. It is not a case where by mutual dealings they were each the debtor of the other, a case of mutual accounts between parties dealing with each other. In such a case there are strong equitable considerations for applying the principles of compensation.

It is not claimed that the assignment was tainted with bad faith, or that there was any purpose to defraud creditors, or defeat his cross-demand. The account being a non-negotiable thing in action, passed subject to all the defenses existing against it, at that time against the assignor.

At common law such a chose of action could not be assigned so as to allow the assignee to sue in his own name. It must be in the name of the assignor, for the use of the assignee.

Fuller v. Steiglitz, Assignee.

Whatever equities existed, whether by way of defeating the cause of action or by counter-demand, could be interposed.

By Section 25 of the Code of Civil Procedure, the real party in interest, in this instance the assignee, must sue in his own name as trustee for the creditors.

In order that this change in the plaintiff in such case should not cut off existing rights of defence, the 26th section provides, "in case of the assignment of thing in action, the action by the assignee shall be without prejudice to any set-off or other defence now allowed."

This section preserves to the debtor the same rights of defence as under the old practice.

No new rights are acquired by the debtor, nor were any additional burdens imposed on the right to transfer such demands.

These provisions of the Code recognized the existing law, and adapted the new system of pleading to it. (*Myers v. Davis*, 22 N. Y., 489; *Martin v. Kunzmueller*, 37 N. Y., 396; *Pomeroy on Remedies*, Sec. 4.)

The set-off allowed by the Code, instead of being limited as formerly to liquidated demands, extends to any cause of action founded on contract or ascertained by the decision of the court, whether the words "now allowed" in Section 26 limits the set-off to the former, or includes the latter, does not arise in this case, as both are liquidated demands.

The plaintiff in error relies on the provisions of Section 99 of the Code, which provides, "Where cross-demands have existed under such circumstances, that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated as far as they equal each other.

If the circumstances were such that had Smal brought an action against Fuller his set-off could have been set up, then Smal could not deprive Fuller of the benefit of his set-off by this assignment. But the circumstances were not such. Before the assignment Smal could bring no action, for no right

Fuller v. Steiglitz, Assignee.

of action had accrued. Fuller had no cause of action that could be set up, because none had accrued. On the 11th of December, 1866, neither had any demand within the meaning of Section 99 that was not subject to be defeated by assignment or death.

It is well settled in such case the death of one of the parties defeats after-accruing cross-demands. Assignment or death are mentioned together, and the circumstances that will defeat the set-off in the one case will do so in the other. (*Granger v. Granger*, 6 Ohio, 35; *McDonald v. Black*, 20 Ohio, 196.)

The same rule applies in cases of insolvency as in case of death. (Waterman on Set-off, Sec. 19; *Funnell v. Nesbitt*, 16 B. Mor., 351.)

We wish to limit these remarks to the case now before us, which is purely and independent cross-demand.

As to defenses which go to defeat the plaintiff's right to recover on his cause of action, such as want of consideration, payment, and the like, Section 99 has nothing to do. It is said that set-off is the creature of statute law, and was probably borrowed from the doctrine of compensation of the civil law. Compensation in case of mutual dealings was founded on a natural equity, which permitted the reciprocal acquittal of mutual debts. The statutes of the different States, as to the exact character of the set-off and when it may be allowed in cases of assignment and the bankrupt law, differs much from the general laws.

By 2 Geo. II., Ch. 22, Sec. 13, a set-off of mutual debts was allowed. Under this statute a set-off was called a "cross debt." (Chitty on Con., 824.)

The set-off as allowed in Ohio prior to the Code, was defined by the Act of February 19, 1824, and was, like the English statute, limited to liquidated demands, or such as might be liquidated by computation.

Then, as well as now, it is clearly distinguishable from payment, recoupment, counterclaim, or any defense which went to defeat plaintiff's right to recover.

It is an independent right of action which is set up to cancel

Fuller v. Steiglitz, Assignee.

in whole or in part an admitted demand. (Waterman on Set-off, Ch. 1.)

Until a demand becomes due, the set-off or counterclaim may be defeated by the assignment by the opposite party of his claim, though the latter be insolvent and his demand has not been payable when assigned. (Waterman on Set-off, Sec. 99.)

Meyers v. Davis (22 N. Y., 489), was a case of an assignment similar to the one at bar, it is here said. The actual rights of the parties were not changed by the alteration of the practice allowing the real party in interest to sue.

The defendant is entitled to the same defence as under the former practice, and the change effected by the Code is simple as to the form in which the action is brought.

The defendant's difficulty is that at the time of the assignment to the plaintiff in this case the demand of the defendant had not matured so as to be the subject of a set-off, and when it had so matured, the demand against him had passed into the hands of the plaintiff, against whom he had no claim.

In *Martin v. Kunzmüller* (37 N. Y., 396) the same question was considered. It was said a set-off must be *in præsenti* at the time of the assignment; that if at that time the defendant had no present demand or debt due and payable, he had no offset; that he cannot set up a debt due by him to the assignor a debt of his matured afterwards. In *Roberts v. Carter* (38 N. Y., 107), in a like case, it was said "the assignment prevented any right of set-off accruing." (Pomeroy on Remedies, 198, et seq.) See also *Beckwith v. Union Bank* (9 N. Y., 212); *Williamson v. Brown* (2 Keyes, 486); *Walker v. McKay* (2 Met., Ky., 294); *Ogden v. Prentice* (33 Barb., 160); *Willis v. Stewart* (3 Barb., 40); *Adams v. Rodarmel* (19 Ind., 339). It is said in argument that these decisions are made under the N.Y. statute of set-off, which is materially different from ours.

We have compared Section 99 with the N. Y. statute on the same point; it reads: "If the demand be such as might have been set-off against such plaintiff or such assignee, while the contract belonged to him."

Fuller v. Steiglitz, Assignee.

The meaning of this is the same as Section 99, so far as the effect of an assignment or set-off is concerned.

In each the test of whether the debtor preserves his set-off depends on whether he could have set up before the assignment—that is, while the contract belonged to the assignor.

Whether we regard this as a question to be determined by the statutes of New York or Ohio is not material, as they are substantially the same.

We conclude, therefore, that Smal, by the assignment before the maturity of either claim, prevented a set-off from accruing. The converse of this holding might work a more injurious preference than is complained of.

A number of cases have been cited to the effect that if the set-off accrued before suit brought it cannot be thus defeated. In New Hampshire the statute is: "If there be mutual debts between the plaintiff and the defendant at the time of the commencement of the action one debt may be set-off against the other." The phraseology of different statutes gives rise to this diversity in the cases.

Again, many cases arising under the bankrupt laws adopt a broader rule.

The court, in 4 Ohio Stat., 593, speaking of these decisions, say: "They have very little if any application to this case." These statutes have generally permitted a set-off of mutual credits, whether due or not, and have therefore administered a much broader equity than the ordinary law of set-off. (See notes to *Rose v. Hart*, 2 Smith Lead. Cases, 293.)

This subject is fully reviewed, and numerous authorities cited in the recent valuable treatise on the subject of Remedies and Remedial Rights, by Prof. Pomeroy, where the conclusion we have reached is fully supported.

II. The second defense is in the nature of an equitable set-off, based on the ground that it is against the public policy of the State to enforce an assignment which gives preferences where the general creditors will be deprived of a large share of their claims.

The defendant, as such creditor, asks that the principles of

Fuller v. Steiglitz, Assignee.

Ohio law on the subject be applied, and to that end prays the court to ascertain what the estate would pay *pro rata*, and have the amount that he would thus be entitled to offset. He claims that the principles of comity between the States does not require our courts to enforce the New York assignment when it injures a citizen of our own State. If we are correct in our conclusions on the first point the defendant has no valid set-off in this action, and no legal or equitable lien or charge against this account. It is not, therefore, a case where he as a citizen of Ohio is claiming rights under our laws as against claims arising under New York laws. By the New York law the plaintiff's right of recovery is complete, and by the Ohio law there is no set-off. If the plaintiff was acting under the insolvent law of this State, the defendant could not have set-off, and a court of equity would not grant him the relief he asks on such grounds, and thus interfere with the Probate Court in the administration of the estate.

The fact that he is a citizen of Ohio creates in his behalf no equities. In fact, as such a citizen, he is entitled to the authority of its courts in support of his rights founded upon its laws. A court of equity would not interfere with an insolvent court of its own State, unless the usual ground for equitable relief was made. The defendant has no equities in this case that is not common to all general creditors, whether citizens of Ohio or not.

An assignment preferring creditors was valid at common law. (*Lawrence et al. v. Davis*, 3 McLean, 177.)

The general rule of inter-State comity is, that the law of the domicile of the owner of personal property and chuses in action controls in their disposition by sale, devise, or assignment. (*Bank of Augusta v. Erle*, 13 Pet., 591; *Sortwell v. Jewett*, 9 Ohio, 180; Story's Conflict of Laws, Secs. 379-384; *Dundas v. Bowler*, 3 McLean, 397.) In *Sortwell v. Jewett* it is said that as between citizens of the United States there is neither justice nor expediency in a rule of policy, that a State should prefer the rights of its own citizens and discriminate against citizens of other States. The natural right of the owner to dispose of

Fuller v. Steiglitz, Assignee.

his own property depends on no locality, and is subject to no restrictions, except in conformity to law. A compliance with these laws should avail equally the stranger as the citizen.

That was a case of an assignment in New York giving preferences where the land assigned, lying in Ohio, had been seized in attachment after the assignment. The court held the Ohio attachment was subordinate to the rights of the assignee.

On the same point the Supreme Court of the United States say: "The intimate union of these States, as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us to preserve a greater degree of comity and friendship and kindness towards each other than we would be authorized to preserve between foreign nations."

State insolvent laws of other States so far constitute a part of the contract that a discharge under them, where the contract was made and to be performed, is a bar in Ohio to any further action. (*Bank of Utica v. Card*, 7 Ohio, pt. 2, p. 170.)

Interest laws of other States, though in conflict with ours, are enforced; the rule being that if the contract was valid where made, and to be performed, it would be sustained in Ohio. (1 Ohio St., 253.)

So a devise in Jamaica of personality in Ohio is governed by the laws of that island. It is said as personal property has no locality, but accompanies the owner, the consequence necessarily is, that the voluntary disposition as well as distribution of it must depend exclusively on the law of the domicile. (*McCune v. House*, 8 Ohio, 144; *Dudas v. Bower*, 3 McLean, 397; *Kanaghan v. Taylor*, 7 Ohio St., 134.)

In *Oliver v. Townes* (14 Martin La., 93), a leading case, an exception to this general rule is stated. It is here laid down that when the laws of a foreign State clash with and interfere with the rights of citizens of the country where the parties to the contract seek to enforce it, as one or the other must give way, those prevailing where the relief is sought must have the preference.

This exception, though not sanctioned by any case of autho-

Fuller v. Steiglitz, Assignee.

rity in this State, is strongly supported by both reason and authority. (*Gaulaudet v. Hall*, 35 N. Y., 657; *Ingraham v. Parker*, 13 Mass., 146; Story's Conflict, Sec.)

In all of these cases there is a conflict of rights under the laws of the two States. Each party is asserting claims founded upon conflicting laws, when one or the other must give way. *Oliver v. Townes* was a conflict between a vendee of a vessel lying at New Orleans, under a sale made in Virginia, and valid there, and an attaching creditor in Louisiana, where the sale was invalid. So also was the case of *Ingraham v. Parker*. In that case Parker, judge, says, a citizen who has actually seized the debt by attachment before it was paid to the assignee would be protected in his lien obtained by the creditor under the laws of our own State, when by the effect of that assignment he would be deprived of all opportunity of participating with the creditors in Pennsylvania in the proceeds of the debtor's effects, would be undue partiality towards foreign creditors.

In *Gaulaudet v. Hall* (35 N. Y., 657), a distinction is drawn between personal property actually located out of New York, and chose in action owing by citizens of other States. The former was held subject to seizure in attachment, so as to defeat the New York assignment, but the latter having no actual situs other than the domicile of the owner cannot be taken from the assignee by the laws of another State. Whether this distinction is sound it is now immaterial to inquire.

In none of these cases, constituting what is called the exception to the general rule, have the courts refused to apply the rules of comity, unless there was an actual conflict of rights growing out of a conflict of the laws of the two States.

In this case there is no conflict between the plaintiff's rights founded on the New York law, and the defendant's, founded on Ohio law.

If by attachment or otherwise this account has been seized, and a lien or charge established against the same under Ohio laws by a citizen creditor of Smal, the question decided in 13 Mass., 146, would have been presented here for decision.

Haas v. The Chicago Building Society.

As it stands, the defendant having no valid claim to reach and appropriate this account to the payment of his claim against Smal, he must be governed by the general rules of comity in such cases.

The judgment is therefore affirmed. Scott, Chief Judge, Day, Wright, and Ashburn, JJ., concurred.

SUPREME COURT—ILLINOIS.

FILED JANUARY 25, 1879.

Courts of Equity may appoint a receiver of the rents and profits in a suit for foreclosure of a mortgage where the mortgaged premises are insufficient to pay the debt and the mortgagor is insolvent. This may be done after a decree and sale of the premises. And it may also be done even if the mortgagee has a title which he may enforce at law, if the source thereof be altogether independent of the mortgage title, and more particularly if the legal title is disputed and uncertain. The law in various States discussed.

ELISABETH HAAS v. THE CHICAGO BUILDING SOCIETY.

APPEAL from Cook County.

BAKER, J.—The points presented by this record are as to the jurisdiction of a Court of Chancery to appoint a receiver to collect rents and profits in a suit to foreclose a mortgage; and as to the authority to make such appointment after decree and the sale of the mortgaged property; and if such discretionary power does exist, whether it was properly exercised in the case at bar.

We find the decided weight of American authority to be in favor of the proposition that the court may, even when the mortgage does not by express words give a lien upon the income derived from such property, appoint a receiver to take charge of it, and collect the rents, issues, and profits arising

Haas v. The Chicago Building Society.

therefrom. Such action will not be taken, however, unless it be made to appear the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility. A combination of these two things seems to be required in all the cases we have examined ; and in one or more of the States it is held necessary still other elements should be conjoined to these before such procedure is justified.

In *Myers v. Estel* (48 Miss., 372) it was held, in the absence of any stipulation in the contract, that the mortgagee shall have the rents and profits ; he has no claim thereto merely on the ground that the debt is due and the title become absolute, but is only entitled to a receiver for the collection and appropriation of the rents where the property is insufficient to pay the debt, and the mortgagor is insolvent or unable to pay any deficiency that might remain after sale of the property mortgaged.

In *Hyman v. Kelley* (1 Nev., 179) the court, after stating that Courts of Equity have usually appointed a receiver, where the property was insufficient to pay the mortgage debt, and the mortgagor was insolvent, review the facts of the case before them, and find therein other equitable circumstances to exist to justify the granting of the relief sought ; and they reverse the action of the lower court, and say : " We think there are many cases where such an appointment is necessary to prevent fraud and injustice and loss of security."

In the *Sea Insurance Co. v. Stebbins* (8 Paige, Chy., 565) it was held that, to justify such appointment in a foreclosure suit, there must be shown, first, a deficiency in the value of the mortgaged property ; and, secondly, that the mortgagor, or other person personally liable for the debt, is irresponsible or is unable to pay the expected deficiency. The same rule is announced in *Aster v. Turner* (11 Paige, Chy., 436), in *Warner v. Gouverneur's Ex'rs* (1 Barb., 38), and in other New York cases.

In *Cheever v. R. & B. R. R. Co.* (reported in 39 Vermont, 654), the doctrine is recognized that the court will appoint a

Haas v. The Chicago Building Society.

receiver, in foreclosure proceedings, for the purpose of preserving the property, and its rents and profits, from waste and diversion.

In Michigan, in the case of *Brown v. Chase* (Walker, Ch. 43), it is said: "A receiver of the rents and profits of mortgaged premises is sometimes appointed, on the petition of the mortgagee, after he has filed his bill to foreclose the mortgage. The court must be satisfied before making the appointment that the mortgaged premises are insufficient to pay the mortgage debt, and that the mortgagor, or other party to the suit who is personally liable for its payment, is insolvent or out of the jurisdiction of the court, so that an execution against him for the balance that shall remain due after a sale of the mortgaged premises would be unavailing."

In *Finch, Administrator, v. Houghton* (19 Wis., 150), where it appeared the whole mortgage debt was past due, and a considerable amount of interest remained unpaid, and the owner of the equity of redemption in possession neglected to pay the taxes, and where the evidence tended to show he had endeavored to obtain tax deeds upon the mortgaged property to defeat the mortgage, and also the mortgaged premises were not an adequate security, and the parties personally liable were not able to pay the deficiency which might arise upon a sale, it was held the court below did not err in appointing a receiver of the rents and profits.

The doctrine that a receiver may be appointed, under circumstances sufficiently strong and clear, in a suit to foreclose a mortgage, is also recognized by the Supreme Court of Iowa, in *Callaman v. Shaw* (19 Iowa, 183).

In *Henshaw v. Wells* (9 Humphreys, 568) the Supreme Court of Tennessee affirmed a decree appointing a receiver in foreclosure proceedings.

In New Jersey the courts will not appoint a receiver simply because the mortgagor is insolvent and the security insufficient, but they will when, coupled with these facts, are circumstances of fraud or bad faith in appropriating the rents for other purposes than keeping down the interest, or when the security

Haas v. The Chicago Building Society.

has materially depreciated in value. (*Cortelyou v. Hathaway*, 3 Stock., 41.)

It is held in California that, in a foreclosure suit, the plaintiff has no right to have a receiver of the rents and profits of the mortgaged property appointed; but that decision is based on a peculiar statutory provision of that State, which expressly confines the remedy of the mortgagee to a foreclosure and sale. (*Gay v. Ide*, 6 Cal., 99.)

We take it, then, to be undoubted law, the Court of Chancery may, where the security is inadequate and the mortgagor unable to pay the deficiency, and a foreclosure proceeding is pending, appoint a receiver, if there are circumstances of fraud or bad faith on the part of the mortgagor, or other facts involved which would render a denial of the relief sought inequitable and unjust.

It is not necessary for the decision of the case before us we should express an opinion as to whether such appointment should be made where circumstances and facts such as we have referred to do not exist in conjunction with the two elements first spoken of; and it will be time enough to dispose of that question when it arises.

It is objected, in this case, the appointment was made after decree of foreclosure, and after sale, and before the time allowed by law for the redemption of the premises had expired. It is urged by appellants that appellee had exhausted his security by a sale of the mortgaged premises, and the statute gave them twelve months for redemption; and it is claimed that implies the receipt of the rents, issues, and profits during that time, to enable them to pay off the incumbrances.

In *Bowman v. Bell* (14 Simons, 392) the English High Court of Chancery appointed a receiver, on motion, after a decree, and though not prayed for by the bill. It is stated by High, in his treatise on Receivers, Sec. 110: "While it rarely happens that courts are called upon to appoint a receiver after a final decree in the cause, the power of appointment after decree is well settled, and is exercised in cases of great emergency, or where the relief is indispensable for the protection of the

Haas v. The Chicago Building Society.

parties in interest." And *Wright v. Vernon* (3 Drew, 112) and other English authorities are cited as supporting the text. In *Thomas v. Davies* (11 Beavan, 29) a case calling very strongly for such relief, a receiver of the rents of the mortgaged premises was allowed after a decree of foreclosure.

In *Hyman v. Kelley* (*supra*) there had been a judgment of foreclosure, and the premises had been sold under it, and bid in at the sheriff's sale, by the plaintiffs, for less than the amount of their debt, and the six months allowed by statute had not expired, and the plaintiffs were not invested with title under the statute; and yet it was held, under the circumstances of that case, the motion for a receiver should have prevailed, and the judgment of the court below was reversed.

Aster v. Turner (11 Paige, 436) is a still stronger case. There the premises had been sold by the master, and bid in by the complainant, leaving a deficiency of six hundred dollars due upon the decree. The appellant was the owner of the equity of redemption, and was in possession of the premises by his tenants at the time of the sale. By the terms of the decree the purchaser was not entitled to the possession of the premises until after the rents would become due and payable. The mortgagor being insolvent, the vice-chancellor directed a receiver of those rents to be appointed, and that they should be applied to the payment of the deficiency remaining due upon the decree. On appeal Chancellor Walworth said: "He was clearly right. If the purchaser had been entitled to the immediate possession of the premises, the rents which fell due the next day would have belonged to him. The legal presumption in that case would have been that he had purchased in reference to such right, and had given more for the premises than he otherwise would have done on account of such rents and profits. Here, however, the purchaser was not entitled to the rents which would become due before his right to the possession of the premises was to commence, even if the order to confirm the master's report should be entered immediately. And, if there had been no deficiency, those rents would have belonged to the owner of the equity of redemption. But the

Haas v. The Chicago Building Society.

mortgagor had an equitable right to such rents to pay the deficiency, which right could only be enforced by an application to the court to appoint a receiver. The final decree stands in full force. And the order to apply these rents towards the deficiency, due from an insolvent mortgagor, is merely a collateral remedy against this fund, which, in equity, was secondarily liable for the payment of such deficiency." Substantially to the same effect is *Howell v. Ripley* (10 Paige, 43).

When a Court of Chancery obtains jurisdiction of the subject-matter of a suit, it will retain jurisdiction until complete justice has been done between the parties; and such jurisdiction is frequently exercised, in case of a foreclosure of mortgage, after final decree and sale, by putting the purchaser in possession, by rendering a decree for any residue unpaid after sale of the property, and awarding execution therefor, and in other ways. Of course, in the matter of an application, such as we are now considering, no order of the kind here made should be entered after final decree, without due notice, if notice is practicable, to the opposite party in interest. But no question of notice properly here arises, as the appellants were fully heard upon the matter, and introduced numerous affidavits which were considered by the court before finally determining as to the appointment of a receiver.

The necessity for the appropriation of the rents to the payment of the mortgage debt may frequently not appear until after both decree and sale. The amount due is often matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from the result of the judicial sale. If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale, we see no good reason why the same and more weighty facts existing after sale may not warrant a similar procedure. The security plainly is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It is true the mortgagee has elected to foreclose and sell; but then he has pursued that remedy to the end, and without getting satisfaction of his debt, and he may avail himself

Haas v. The Chicago Building Society.

of any just and equitable means of collecting the residue. Not that he may have such extraordinary remedy in all cases of a deficit in the proceeds, but only where it is indispensably necessary for his protection, and just and equitable.

We hold, then, both upon the principles of equity that lie at the foundation of the Chancery Court, and upon authority, a receiver may sometimes be allowed after decree and sale; and that a mortgagee does not, in all cases, exhaust his security by a foreclosure and sale. It is, however, a power that the chancellor would be slow to exercise, except in an extreme case and to prevent palpable wrong and injustice.

The points made, that the court will not appoint a receiver on the application of a party who has the power of protecting the property without it, and that appellee has his remedy by asserting his title in a court of law, do not strike us with much force as applied to the matter now in hand. It is true, it appears from affidavits filed, appellee claims ownership of the premises under deeds based upon a mechanic's lien proceeding, and upon a sale made under a prior incumbrance. But these claims are contested, and both appellants swear in their affidavits that the title to said real estate is in the appellant, Elisabeth Haas. The titles of appellee are not displayed in this record, and we are unable to determine therefrom. It has such title as it could effectually assert in the law court. Besides such alleged titles grew out of subject-matters wholly disconnected with this suit, and are independent of the right here involved; and equity having once obtained jurisdiction will retain the same, notwithstanding appellee may have since acquired some legal right by which he could get possession in the law court.

Counsel for appellants make no points, in their briefs, upon the questions of fact involved. We have examined the affidavits submitted on the motion and contained in the record. The decided weight of the testimony shows the mortgaged premises are grossly inadequate security for the mortgage debt. The decree of the court was for twenty-seven thousand seven hundred and sixty-three dollars and ninety-five cents, and appellee purchased the property at the sale for nineteen thousand dollars,

Haas v. The Chicago Building Society.

leaving a balance of nine thousand and seventy-nine dollars and ninety-five cents unpaid. The amount bid seems to have been about the value of the property. Then there were three prior incumbrances, amounting to five thousand dollars, and a mechanic's lien for three hundred and thirty-five dollars and sixty-five cents; all this, without calculating any interest on the decree, which was entered in January, 1875, and without taking into consideration several years of accumulated interest on the other incumbrances. Appellants allowed the premises to be sold on some of these claims, and appellee was forced to buy them in to protect its interests. Appellants have failed to pay the taxes for years, and appellee has been compelled to pay five hundred and eighty dollars and eighty cents taxes thereon; and there was, at the time the motion was submitted, six hundred and thirteen dollars and fifty-six cents unpaid taxes due; appellee also paid four hundred and eighty-seven dollars and eighty-five cents for insurance on the buildings, but the conduct of Elisabeth Haas has been such that the companies refused to reinsure, and one of them cancelled its policy.

Appellants prosecuted an unsuccessful appeal from the decree of foreclosure to this court, and have, from the date of the decree, been in possession of the premises by their tenants, and have collected the rents and have used them as a means of support for the family, allowing interest on the several liens to accumulate and leaving the taxes wholly unpaid, and allowing some of the incumbrances to culminate into what may be valid legal title.

It is evident that they have no ability to [redeem] or intention of redeeming the property, and are seeking to make all out of it they can, and render it as little available to appellee as possible. The statements in their affidavits seeking to question the amount due appellee, and for which decree was rendered, availed nothing, as that matter is *res adjudicata*.

Under the peculiar circumstances of the case, we cannot say the order of the Circuit Court, appointing a receiver, was erroneously made, and the judgment of that court must be affirmed. Affirmed.

Boese v. Locke et al.

NEW YORK SUPREME COURT—FIRST DEPARTMENT.

MARCH TERM, 1879.

The statute of New Jersey, enacted in 1846, entitled, "An Act to secure the creditors an equal and joint division of the estate of debtors who convey to assignees for the benefit of creditors," is an insolvent law, and as such was suspended by the passage by Congress of the United States Bankrupt Act.

The general assignment law of other States distinguished and their effect discussed.

THOMAS BOESE, as Receiver, &c., of WILLIAM H. LOCKE, respondent, v. WILLIAM H. LOCKE and WILLIAM KING and others, as Assignees, &c., of WILLIAM H. LOCKE, appellant.

APPEAL from a judgment entered upon a trial by the court without a jury setting aside an assignment for the benefit of creditors, executed under and pursuant to the statute of New Jersey, by Locke to the other defendants, and directing the assignees to pay the judgment in this action.

A. P. Whitehead and M. W. Divine, for the appellants.

C. Bainbridge Smith, for the respondent.

BRADY, J.—On the 23d of September, 1875, the defendant Locke made and delivered to the other defendants an assignment of his property in trust, to take possession of and collect and to sell and dispose of the same at public or private sale, in their discretion, and to distribute the proceeds to and among the creditors of the assignor, in proportion to their several and just demands, pursuant to the statute in such case made and provided. The defendant Locke was at the time of the assignment a resident of New Jersey, and the statute referred to in the clause quoted was one of that State passed April 16th, 1846, entitled, "An Act to secure the creditors an equal and just division of the estate of debtors who convey to

Boese v. Locke et al.

assignees for the benefit of creditors." The statute provides, among numerous other things, that if any creditor shall not exhibit his, her, or their claim within the term of three months after the time designated therefor, such claim shall be barred of a dividend, unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditors shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a ratable proportion therefrom (Section 11). It also provides by Section 14 that, although nothing in the act shall be taken or understood as discharging the debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims either in regard to the persons of such debtor or to any estate, real or personal, not assigned yet, with respect to creditors who shall come in under the assignment and exhibit their demands for a dividend, they shall be wholly barred from having afterwards any action or suit at law or in equity against such debtor or his representatives, unless they shall prove fraud against the debtor "with respect to the assignment or concealing his estate, real or personal, whether in possession, held in trust, or otherwise.

It will be perceived on examination of these provisions that they are at utter variance with the effect of a common law assignment for the benefit of creditors, either with or without preferences. In the first place, the assigned estate is given to the creditors who come in and prove their claims, to the exclusion of the others until the debts of the former class allowed are fully satisfied, unless a creditor, who did not present his claim, shall find some other estate, not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a ratable proportion therefrom. In the next place, it is declared that the creditor who shall come in under any assignment and exhibit their demands for a dividend, shall, as we have seen, be wholly barred from having any action, unless upon proof of fraud, with respect to the assignment or concealing his estate, real or personal, whether in possession, held in trust, or otherwise.

Boese v. Locke et al.

The estate is therefore by the statute distributed among the creditors only who exhibit their claims for a dividend, and not generally, and upon those who receive the *pro rata* distribution the statute operates as a release and forever bars their remedy against the person and estate of the debtor or the assignor. This is the condition upon which the creditor is paid his portion of the estate. These inhibitory and prohibitory provisions are not the characteristics of a common law assignment for the benefit of creditors. Such an instrument must be absolute and unconditional, imposing coercive terms upon creditors for the advantage of the assignor as the condition of receiving its benefits. (Burrill on Assignments, 256, and numerous cases cited.) The statute relating to insolvency generally, and indeed uniformly, provide either for the exoneration of the debtor from imprisonment or from his debts on executing the assignment prescribed by the statute under which his application is made. No debtor could make a valid assignment at common law which would exact from the creditor a discharge either relating to the person, property, or liability of the debtor as a condition of receiving a portion only of his debt, and the statute under consideration tested by that rule cannot be regarded as any other than an insolvent law by which persons unable to pay their debts can secure immunity from prosecution by such of their creditors as accept a stipend under a distribution of the assigned estate among creditors. No debtor would be allowed either to declare by way of assignment that unless his creditors presented their claims within a certain time his estate should be given to those who came in within the period limited; and, judged by this test, the statute is an insolvent law designed to accomplish what the debtor could not effect by any act of his own.

In the elements of a prescribed period for the presentation of claims and the discharge provided for, the statute referred to assimilates to the insolvent law of this State and of the States of the Union in general. The statute in effect prohibits any assignment which is not to be followed by the results stated. It does not in express terms, but does by necessary implication,

Boese v. Locke et al.

and accomplishes in that mode the prohibition. It declares that every assignment shall be made for the equal benefit of creditors in the proportion of their several demands to the net amount that shall come to the hands of the assignee for distribution, and prohibits preferences, and then provides what shall be done in relation to such assignments, including the provisions in the sections already stated and discussed. The effect is to compel an assignment in a particular mode, and to arrange the distribution of the property assigned and the consequences of such distribution to creditor and debtor. It is true that no one is compelled to present his claim, but that does not at all affect the character of the statute, because the conditions of acceptance remain and its coercive feature still exists. The question then springing from this view is whether the assignment is void, as in contravention of the Bankrupt Law which suspended the insolvent laws of the several States. The assignment, it is found by the court below, was made in good faith, and without any intent to hinder, delay, or defraud creditors, and with the intents *bona fide* to make an equal distribution of the proceeds of the assigned estate among the creditors of the assignor in conformity with the requirements of the Legislature. It may be said, in addition, that it was made in the only mode allowed by the law of New Jersey, where it was executed. The precise question suggested has not been disposed of by the court of last resort in this State. It was held in *Thrasher v. Bentley* (59 N. Y. R., 649) that an assignment for the benefit of creditors by an insolvent debtor which gave no preferences, no proceedings in bankruptcy having been taken against him, was not void as in hostility to the Bankrupt Law of 1860 of our own State, to be suspended by the Bankrupt Law, and for reason that an assignment for the benefit of creditors was not created by the Act of 1860, but existed at common law.

The decision of the Supreme Court of Connecticut in Hawkins's Appeal (see 24 Conn., 548) was approved. In the latter case of *Haas v. O'Brien* (66 N. Y. R., 597) it was again declared that such an assignment, made in good faith, without in-

Boesé v. Locke et al.

tention to defeat the object, impair or impede the operation, or evade any of the provisions of the Bankrupt Act, which transferred all the insolvent's property without preferences, was not a violation of the spirit and intent of the act, and was not *void per se*.

It was also held in that case that the validity of an assignment was not affected by the fact that proceedings in bankruptcy were taken against the assignor within six months, and that the Bankrupt Act was not intended to interfere with the action of a debtor who, in good faith, without any fraudulent intent, voluntarily sought to apply his property to the payment of his debts in equal proportion, precisely as it would have been applied had proceedings been taken under that act. (See also the latest case, *Bostwick v. Burnett*, 18 Alb. Law Jour., page 418, to same purport.) In these cases the distinction between an insolvent act of the Legislature *per se* and an act regulating to some extent a voluntary assignment for the benefit of creditors was not discussed; indeed was not at all considered. It was not necessary that it should be, because the sphere of such an instrument was not enlarged, and there was no new force or effect given it by the statute which related to its form and execution merely, and not its effect. The question was not discussed or considered either by the Supreme Court of Connecticut, in Hawkins's Appeal case (*supra*), nor in the case of *Maltbie v. Hotchkiss* (38 Conn., 80); but it seems to have been considered and disposed of in the case of Geery's Appeal (43 Conn., 289), by a divided court, in which one of the judges concurred, after hesitation, in the judgment pronounced, and from which two of them dissented. It was conceded that the question was a close one, by no means free from doubt and difficulty, and that there was a conflict of decisions upon the general subject of the effect of the Bankrupt Act in reference to acts of insolvency. In the case of Shephardson's Appeal (36 Conn., 23), which was an appeal from a decree of a Probate Court appointing a trustee in insolvency of the estate of the appellant in insolvent proceedings against him by his creditors under the Insolvency Law of the State.

Boese v. Locke et al.

PARK, J., stated in his dissenting opinion that if the debtor owed more than three hundred dollars (which was the lowest sum fixed for the application of the Bankrupt Act), the majority of the court conceded that the Probate Court had no jurisdiction, because the Bankrupt Act then applied and suspended the Insolvent Act in cases of involuntary insolvency.

The question discussed seems to have been more distinctly presented in that case than any of the other cases in Connecticut to which our attention was called. These adjudications are considered with more particularity, because they were more prominently relied upon, with the exception of the case, *Meyer v. Hellman*, to which reference will be made, and were more prominently presented upon the argument than any other. The writer of this opinion had occasion to examine a kindred question, and upon the consideration of the authorities, which were found to be conflicting, arrived at the conclusion that the power conferred upon Congress by the Constitution to establish a uniform system of bankruptcy throughout the United States having been exercised by the enactment of a law for that purpose on the 2d of March, 1867, that the law became paramount and exclusive, and suspended the operation of the Insolvent Laws of this State over all cases within its purview. (See *Shears v. Sorhinger*, 10 Abb. (N. S.), 287, and case cited.) It was stated in the case just mentioned that the converse of these propositions, if declared, might lead to conflicts between the State and Federal authorities in the administration of their powers over the same subject-matter, in reference to which had right to legislate, and that the State law yielded therefore. In the case (*supra*) decided by our Court of Appeals, as already suggested, the distinction between an Insolvent Law *per se* and an act of insolvency voluntary on the part of the debtor and controlled by the rules of common law, was not discussed. In the case of the 10th Abb. (*supra*), the question was distinctly presented, because the debtor had obtained a discharge from his debts under an Insolvent Law of this State, known as the "Two-thirds" Act, which provides for a voluntary application

Boese v. Locke et al.

by an insolvent, aided, by consent of his creditors, to the amount of two-thirds of his indebtedness, and the discharge obtained, in which not only as to them but as to the other third not assenting, operates as a release of debts due. It may be here observed that the statute of Connecticut on the subject of voluntary assignments for the benefit of creditors does not contain provisions kindred to those found in the statute of New Jersey, to which reference has already been made, and by which the whole subject, namely, the assignment and the disposition of the assigned assets and the consequences, are regulated and determined. The case of *Meyer v. Hellman* (1 Otto, 496) does not sustain the appellant's view. The assignment considered in that case was one for the benefit of creditors in the State of Ohio, and it appeared that there was a statute in that State regulating the mode of administering assignments for the benefit of creditors. It was held, however, that that statute did not in terms compel or even authorize assignments, but assumed that such instruments were conveyances previously known, and provided only a mode by which the trust should be executed; and, further, that there was nothing in the act resembling an Insolvent Law. It did not discharge the insolvent from arrest or imprisonment, and let his after-acquired property go to his creditors, precisely as though no assignment had been made. It was said, indeed, that the provisions for enforcing the trust were such as a Court of Chancery would apply in the absence of any statutory provision; and, further, that the assignment must be regarded as though the statute of Ohio *had no existence*. There is a wide difference, therefore, between the act of the Legislature of New Jersey and that of Ohio, as we have seen.

There is no doubt, as suggested by the Supreme Court in Connecticut, that the subject discussed is not free from difficulty, and that there are conflicts in the adjudications relating to it; but, nevertheless, for the reasons assigned, the conclusion seems to be inevitable that an Insolvent Law, created by act of the Legislature in regard to assignments for the benefit of such as the statute of New Jersey (*supra*), is in conflict with

In re Marquand, Jr.

the Bankrupt Law of the United States. For these reasons the judgment must be affirmed. With some hesitation, I concur.

INGALLS, J.

DAVIS, P. J., dissents.

Judgment affirmed.

NEW YORK COURT OF COMMON PLEAS.

JUNE TERM, 1879.

An assignee for the benefit of creditors has no right to use the trust funds in the purchase of claims against the assigned estate and he have the benefit of the profits of the transaction. If any profit is made in such manner it inures to the benefit of the creditors of the assigned estate, and the assignee, upon his accounting, can be compelled to pay it to the creditors. If creditors have been induced by the assignee to accept less for their claims than the ratable share due them, they can still be allowed to get from the assignee, on his accounting, the ratable share due them.

In re MARQUAND, Jr., Assignee of FREDERICK W. COFFIN and WILLIAM ROSCOE LYON, Composing the Firm of COFFIN & LYON.

MOTION to compel an assignee to account. The facts appear in the opinion of the court.

R. C. Elliott and Gleason & Cator, for creditors.

Albert Roberts, for assignee.

VAN HOESSEN, J.—No fault is found with the proceedings of the assignee until he attempted to make money for himself by his management of the assigned estate. He conceived the idea of inducing the creditors of Coffin & Lyon to release their claims against the assigned estate for less than the estate would have yielded to them on an honest administration; and to accomplish his purpose he addressed a circular letter to them, in which he stated that the law gave him seven months

In re Marquand, Jr.

more time in which to settle the estate, and that it was for their interest to accept a final dividend of fifteen per cent. immediately, which dividend he was then able to pay, but he doubted if so much would be paid if he exercised his right of withholding payment till the lapse of one year from the date of the assignment. Most of the creditors, upon receiving that letter, thought it prudent to accept Marquand's offer, and he then paid every creditor, except two who refused to listen to his proposal, fifteen per cent. on the amount of his claim. He exacted, however, from every one he paid, an assignment of all demands against C. & L., against himself as assignee, and against the assigned estate; the assignments were, as a rule, drawn in blank, and the name of a Mr. Roulon was afterward written in. Roulon was acting as representative of Marquand, who was the actual assignee of the claims of the creditors who accepted the fifteen per cent. No money was paid except what came from the assets of the estate in his hands, save in a few instances where a refractory creditor refused to accept fifteen per cent., and where such a difficulty was encountered enough extra was paid by the assignee or his friends to obtain the assignment. The assignee now contends that he is entitled to whatever profits are to be derived from the purchase by him of these claims, in the manner which I have described. He admits that his proceedings were unlawful, and utterly indefensible if called in question by any creditor whose claim was bought; but insists that neither the court nor any other person than one who made an assignment can challenge the validity of his illegal transactions or prevent him from enjoying the fruits of his breach of trust. He plants himself upon the proposition that no one can assail the act of a trustee who defrauds his *cestui que trust* except the *cestui que trust* himself, and cites a case decided in the State of Mississippi to that effect. I have looked into that case, and I think that it has no bearing upon the point involved in this. If it had appeared in the Mississippi case that the executor had used moneys belonging to the estate in the purchase of legacies, it is not to be believed that the court would have decided that the executor was en-

In re Marquand, Jr.

titled to retain to his own use the profits of his purchase. It may well be that where a legacy is paid in full, the legatee so paid is not the proper party to call in question the acts of an executor who misconducts himself, but if legacies are subjected to an abatement any legatee whose legacy is reduced in amount has a right to call upon the executor to account for and to pay over any profit he has made by the use of the moneys of the estate in speculation. It matters not whether that speculation was in buying claims against the estate.

In buying claims of legatees, or in operations entirely disconnected from the business of the administrator, so in the case under consideration: the creditors who have not been paid have the right to exact from the assignee every dollar he has made by the use of the trust funds for his own purposes. Every purchase of the claim of a creditor for less than its ratable share of the assets is for the advantage of the other creditors and not for the advantage of the assignee.

It is not now necessary to say what rule would be adopted if the assignee had used his own moneys in the purchase of claims; as for myself, my impression is that whether he uses his own money or the funds of the estate, he should not be permitted to deal in any way likely to lead him into the temptation of making money out of his *cestuis que trust*.

Under the circumstances in this case I think that those creditors who were influenced to make the assignments by the letter of the assignee, should have an opportunity to present their claims for the balance due upon their ratable proportion of the assets. The statement of that letter was likely to frighten creditors into the acceptance of almost any offer which the assignee chose to make. A day should be fixed before which creditors who made assignments to Marquand, or to his representative Roulon, may present their claims for the balance remaining unpaid, and certify to their wish to undo their assignments. If they wish to undo their transfers they may share in the fund, but if they prefer to ratify their assignments the share they would otherwise receive will be distributed among the creditors. In any event the assignee must not profit

Executors of Stephenson v. Donahue et al.

by his misuse of the trust estate. Upon the application of any creditor, Marquand will be removed and a new assignee appointed to close the estate. For the time that Marquand was executing the duties of his office in good faith, he should receive compensation. It is true that the assignment act provides that the assignee shall receive as his commission five per cent. upon the moneys coming into his hands, but the statute is not to be so construed as to give the commissions, no matter how unfaithful or dishonest the assignee may be. (3 Wait's Law Actions and Deft., 248.)

From the time he began to use his position for his own gain, he should not be allowed either his commissions or expenses. He should not be allowed any fees paid to his counsel, for obtaining the assignments, or for any service connected with the assignments, and no commissions should be paid to the assignee upon moneys which came into his hands after he issued his circular letter and entered upon the business of betraying his trust.

HAMILTON COUNTY DISTRICT COURT—OHIO.

NOVEMBER, 1879.

A voluntary conveyance is not fraudulent against creditors amply secured by mortgage; nor does it become so from the mere fact that subsequently by delay, at the instance of the debtor, the mortgage security is lost.

EXECUTORS of WILLIAM STEPHENSON v. E. R. DONAHUE et al.

Error to Superior Court of Cincinnati.

IN 1837 Eden B. Reeder gave Charles Fox a note for one thousand one hundred dollars, secured by mortgage. Afterward Stephenson became owner of the note and mortgage, and at the April Term of 1842 of the old Supreme Court, obtained a decree of foreclosure, but took no steps to sell under the decree. In 1848 Reeder sold the property at auction to various

Executors of Stephenson v. Donahue et al.

persons, who had no actual knowledge of the mortgage or decree. In 1869 Stephenson obtained an order of sale from the District Court, which succeeded the old Supreme Court, but the purchasers from Reeder coming in, the Court held that as against them Stephenson had lost his right to enforce the decree, and quieted their title. This was affirmed in the Supreme Court. At the same time, however, the District Court rendered a personal judgment against Reeder for the amount found due in the decree, with interest, making four thousand one hundred and twenty-five dollars. Upon this judgment the executors of Stephenson, he having in the meanwhile died, brought their action in the Superior Court, alleging that in 1844 Reeder had conveyed his residence in Mount Auburn to a trustee, for his wife and daughters, without consideration, and with intent to defraud creditors. The Superior Court found that, while Reeder at that time was largely in debt, and had a large amount of property—not finding either the amount of the debts or the property—the mortgage was ample for the amount owing to Stephenson, who had lost the security by his own negligence. The petition was dismissed.

Fox & Bird, for plaintiffs in error.

O'Connor, Glidden & Burgoyne, and *Mallon & Coffey*, contra.

EVERY, J.—A voluntary conveyance by one indebted at the time is not *per se* fraudulent. (*Miller v. Wilson*, 15 Ohio, 108.) The question is always open whether sufficient property was retained to pay debts (*Crumbaugh v. Kugler*, 2 O. S., 373; *Gormley v. Potter*, 29 O. S., 597). And without showing intentional fraud, or a secret trust for the benefit of the grantor, it cannot be avoided by subsequent creditors. (*Webb v. Roff*, 9 O. S., 430.) The conveyance here did not affect the holder of the note, since he was amply secured by mortgage. Although he may have been induced by the debtor to delay, and so lost the security, this was a subsequent circumstance. Where the circumstances are such that a voluntary conveyance must neces-

In re Cohn et al.

sarily defeat or delay creditors, actual intent need not be shown. (*Freeman v. Pope*, L. R. 5 Ch. App., 538.) But the state of circumstances to be looked at is that existing at the time of conveyance, and not subsequent events, except such as may be held to have been in contemplation at the time. (May on Fraudulent Conveyances, 31.) The facts found do not connect the conveyance in question with the subsequent efforts to secure delay upon the mortgage, nor could it have entered into the mind of the debtor at the time that there would be such delay as that the security would be lost.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

SEPTEMBER, 1879.

An assignee, under Chap. 466, Laws of 1877, as amended by Chap. 318, Laws of 1878, may be removed for misconduct or incompetency.

Where the assignee was the adviser, counsel, and active agent of the assignor's wife in procuring a judgment in her favor against the assignor, under circumstances strongly indicative of collusion and fraud, and in causing an execution to be levied upon the assignor's property, and in causing a sale to be had thereunder five days previously to the assignment, whereby a large amount of property was disposed of, *held*, misconduct sufficient to authorize the assignee's removal, and that, as the position and duties of the assignee as the wife's attorney, and his obligations as a representative of the insolvent estate were incompatible, he was incompetent under the act.

"Misconduct" and "incompetency" defined.

Held, also, that all proceedings under the Insolvent Act shall, in New York City, be deemed to be had in court, although conducted before a judge of the Common Pleas, and all orders and decrees have the same force and effect, and may be entered, docketed, enforced, and appealed from, the same as if made in an original action brought in the court.

In the matter of the Petition of CHARLES COHN et al., creditors of WILLIAM B. BURTNETT, for the removal of THOMAS F. WENTWORTH, as assignee of BURTNETT, for the benefit of creditors.

THE facts are stated in the opinion.

Thomas G. Sherman, for the appellant.
S. Hand, for the respondents.

In re Cohn et al.

EARL, J.—These were proceedings for the removal of an assignee under the act, Chapter 466, of the Laws of 1877, as amended by Chapter 318, of the Laws of 1878. Such proceedings in the city of New York are required to be conducted before a judge of the Common Pleas; and in Section 22 of the act, as amended, it is provided that all proceedings under the act shall be deemed to be had in court; that the court shall always be open for such proceedings, and that the judge, when acting in such proceedings, shall be deemed to be acting as the court. It is also provided that all orders or decrees in such proceedings shall have the same force and effect, and may be entered, docketed, enforced, and appealed from, the same as if made in an original action brought in the court.

These proceedings were conducted in conformity with the statute, and, so far as we can discover, were regular.

The sole question, therefore, is whether there was sufficient cause to authorize the removal of the assignee by the judge. He could be removed for misconduct or incompetency. We think a sufficient case was made to authorize his removal on either ground. There are grounds for believing that the judgment obtained against the assignor, for the benefit of his wife, was, to a large extent, fraudulent; that it was procured upon claims in large part fictitious, for the purpose of absorbing the assignor's estate and keeping it from his just creditors. In procuring this judgment, the assignee was the adviser, counsel, and active agent of the wife; and it may be assumed that he knew the facts upon which it was based, and the purposes for which it was obtained. Under his direction, an execution was issued upon the judgment five days before the assignment was made, and levied upon property worth about twenty-eight thousand dollars; and four days after the assignment this large amount of property, with his co-operation, was sold for about nine thousand dollars, and the proceeds paid to the assignor's wife. He made no efforts to arrest the sale or the proceeds, and knowing what he did of the facts, he could not omit such efforts without being guilty of misconduct.

Then, again, his relations to Mrs. Burnett, as her counsel,

In re Cohn et al.

were such that he could not have taken measures to assail the judgment or to prevent a sale upon the execution without a violation of the duty which he owed her as her counsel. As assignee, it was his duty to make efforts to protect the property of the assignor, for the benefit of the creditors, whose trustee he was, from that judgment. As counsel for her, he was under a prior obligation to her to maintain that the judgment, and not to embarrass her in its enforcement. He could not, therefore, do his duty as assignee without a breach of the duty which he owed her as counsel. Under such circumstances, we cannot say that the judge made a mistake in holding that a case of incompetency was, within the meaning of the statute, made out.

We do not mean to determine that the judgment was absolutely fraudulent, and that it could certainly have been set aside. All we mean to say is, that the facts upon which it was based, and the circumstances under which it was obtained, were such that an assignee cognizant of the facts could not stand by and suffer the whole trust estate to be swept away, without any efforts to avoid such a calamity.

The creditors were entitled to an assignee who could impartially, and without a violation of duty which he owed to others, assail that judgment and the sale made under it.

The words "misconduct" and "incompetency," as used in this statute, have no technical meaning. The two were intended to embrace all the reasons for which an assignee ought to be removed. The power of summary removal conferred upon the county judge, sitting as a court, was intended to be as broad as the exigencies of the case might require. This power could not be less than that possessed by a court of equity; and that upon such facts as exist here, a court of equity would have power to remove a trustee, cannot be doubted, (2 Perry on Trusts, Secs. 817, 818.)

The order must be affirmed, with costs.

All concur, except ANDREWS, J., absent.

Herbst and Buehler's Appeal.

SUPREME COURT—PENNSYLVANIA.

JUNE, 1879.

Upon a sale of real estate under Act of February 17, 1876, P. L. 4, by an assignee for the benefit of creditors, a judgment which was a lien at the time of the sale and of confirmation, and would then be entitled to be paid out of the proceeds, is not deprived of its right thereto by reason of the expiration of five years from its entry before payment of the purchase money and delivery of the deed.

An assignee for the benefit of creditors has no such interest in the distribution between creditors as to give him a right of appeal.

HERBST & BUEHLER'S APPEAL.

APPEAL from Court of Common Pleas of Adams county.

This was an appeal by Samuel Herbst, Assignee of William C. Stallsmith, and C. H. Buehler, a judgment creditor of Wm. C. Stallsmith, from a decree of the Court of Common Pleas, made upon the petition of Mary Campbell, the appellee, a judgment creditor of William C. Stallsmith, to have her judgment paid in full out of the proceeds of the sale of lands in the hands of the assignee in trust for creditors.

The petition of Mary Campbell set forth that she was plaintiff in a judgment entered December 6, 1872, against Wm. C. Stallsmith; that said Stallsmith had executed a deed of assignment to Samuel Herbst July 13, 1877, in trust for creditors; that said assignee on the 18th of August, 1877, filed his petition for an order to sell the assigned real estate discharged of liens, under the provisions of the Act of Feb. 17, 1876, and an order was thereupon granted for that purpose; that on the 15th of October, 1877, the assignee made return to the order that he had sold the assigned real estate on the 29th of September, 1877, and the sales so made were then confirmed by the court, divesting liens; that the lien of her judgment was in force before said assignment, and at the time of the confirmation of the sales made by the assignee; that on the 1st of April, 1878, she attended at the prothonotary's office to receive the money due on her judgment, amounting to four hundred and eight dollars and thirty-six cents, but the assignee, under advice of

Herbst and Buehler's Appeal.

counsel, refused to pay her the money, or any part of it, and prayed for a rule on the assignee and judgment creditors to show cause why her judgment should not be fully paid.

The answer of the assignee and judgment creditors admitted the facts as stated in the petition to be true so far as stated, but says that the assignment in trust was without preference, and under it all the creditors must be paid in proportion to the amount of their claims *pro rata*, the estate being not sufficient to pay in full; that by the terms of the order of court for the sale of the assigned property, the deeds of conveyance to the purchasers were to be made and delivered, and the purchase money paid and secured, April 1, 1878, and deny that the liens were divested or in any way affected by the confirmation of the sale; that the assignee executed the deeds and received the purchase money April 1, 1878, but refused to pay petitioner's judgment because its lien had expired December 6th, 1877, before the conversion of the property, and was not a lien upon the funds in his hands, and the petitioner was entitled only to a *pro rata* dividend as a general creditor.

The case was heard on petition and answer and facts shown by the record, and the rule, which had been granted at the petitioner's instance, was made absolute, whereupon Herbst, the assignee, and C. H. Buehler, who held judgments which were liens on the property sold at the time of sale and conveyance, but will not be fully covered by proceeds in case the claimant of the appellee is paid out of the fund, took this appeal, assigning for error the action of the court in making the rule absolute to pay the judgment of Mary Campbell in full out of the proceeds of the real estate in the hands of the assignee.

R. G. McCreary, Esq., for appellants.

W. A. Duncan, Esq., for appellee.

MERCUR, J.—This fund in contention was produced by a sale under the Act of 17th of February, 1876. It authorizes the Court of Common Pleas to order an assignee in trust for

Stamp v. Case.

the benefit of creditors, to make sale of the assigned real estate, which is incumbered by liens. The assignment of error presents the single question whether a judgment which at the time of sale and confirmation, is a lien, and would then be entitled to be paid out of the proceeds, is deprived of all right thereto by reason of the expiration of five years from its entry, before payment of the purchase money and delivery of the deed? That it is not, is expressly ruled in Tomlinson's Appeal, just decided, 36 Leg. Int., 354. The language and object of this Act of the 17th of February are there carefully considered. It is shown that such a construction would be contrary to the manifest purpose and spirit of the Act, as it expressly declares the judgment liens are discharged by the confirmation of the sale, the rights of the owners of the judgments then attach to the fund. The confirmation is an act separate and distinct from a payment of the purchase money: Carver's Appeal, 36 Legal Intell., 331. A right vested at the time of confirmation is not divested by a postponement of the payment of the purchase money. It is unnecessary to repeat the reasons given in Tomlinson's Appeal. They fully sustain the learned judge in holding that the right of the appellee was not forfeited after the confirmation of the sale. Herbst, as assignee, has no such interest in this distribution between creditors, as to give him a right of appeal, and his appeal is quashed.

As to the other appellant, decree affirmed and appeal dismissed at the costs of the appellants.

SUPREME COURT—MICHIGAN.

SEPTEMBER, 1879.

After the execution, but before the delivery of an assignment to the assignee, an attachment was levied on the property assigned. The assignment had, however, been previously given to an agent of the assignee for delivery to the latter; and antecedent to that the assignor had had a conversation with the assignee relative to the contemplated assignment. As

Stamp v. Case.

soon as the assignee received the assignment, he accepted the trust, until which time he had no actual knowledge of an assignment having been made. The assigned property was left by the agent in charge of the assignor for the assignee.

Held, The assignment was prior to the attachment.

STAMP v. CASE.

GRAVES, J.—This case involves a contest between an assignee for creditors on the one hand and certain attaching creditors on the other, and the question is, which first took effect, the assignment or the levy of the attachment.

The fairness and good faith of the assignment are not disputed, and no objection is urged against the regularity of the attachment proceedings. The determination depends finally on the answer to this question: Were the acts concerning delivery of the assignment such as bind the property prior to the attachment levy? The defendant in error claims that they were, and the plaintiff in error that they were not.

The subject was discussed at the bar with much learning and ability, and many authorities were cited. We shall not attempt an examination and comparison of cases. A full and critical review would require much time and space, and a partial examination would not be useful. The view taken is supposed to bring the case within principles generally admitted. There is no controversy about the facts, and their meaning is not doubtful.

November 19, 1878, Nelson J. Huber was engaged in merchandising at Marcellus, in Cass County. He had been so engaged for some time previously. He was in debt to Charles Root & Co., of Detroit, in the sum of two thousand four hundred dollars; to R. and J. Cummings & Co., of Toledo, in the sum of one thousand dollars; to Johnson & Wheeler, of Detroit, in the sum of three hundred dollars; and to Barkman & Thorp, of Three Rivers, in the sum of twelve dollars, and to no others. These debts were all due.

Between two and three o'clock of that day, the plaintiff in error, being sheriff of the county, levied an attachment in favor of R. and J. Cummings & Co., on the goods in Huber's store,

Stamp v. Case.

and found Huber in possession. He informed the sheriff that he had assigned to Case, and was holding for him. Case subsequently brought this action of trover on the sheriff seizure, and recovered.

We may now turn to matters connected with the giving of the assignment. About two weeks before the attachment, Case, who was one of the firm of Charles Root & Co., met Huber and conversed with him about his affairs. His business embarrassment was talked about, and Case desired that he would consult him in the event of his becoming so pressed that he could not continue, and Huber then made request that he would settle up his matters in case it was found necessary to suspend business, and Case then promised he would do so. He told Huber that "if it became necessary he would settle his business up for him; that he should do nothing without consulting him, and not lose his nerve and give any mortgage to Cummings & Co." An assignment was not in terms mentioned.

Early in the day of the attachment—November 19—and before its issue, the firm of defendant in error, Charles Root & Co., sent their salesman and agent, Leonard, to Huber, at Marcellus, to get their debt secured. No instructions seem to have been given concerning the way to be taken or the security to be obtained. The agent was left to act according to his judgment of the circumstances.

Leonard, as representative of the firm of defendant in error, for this purpose requested Huber to give a mortgage. He declined to do that, and proposed to make an assignment for the benefit of all his creditors. Yielding to this suggestion, as an offer of security, Leonard then requested that Case should be constituted assignee, and Huber assented. The assignment was then drawn, with Case named as assignee. Huber executed it in presence of Leonard and another, and acknowledged it. It contemplated that schedules would be attached, but none were supplied until several days afterward. They were not necessary to pass the property. As soon as the instrument was acknowledged, Huber handed it to Leonard, with instructions

Stamp v. Case.

to take it to Case. Huber took Leonard to the store and showed the property to him, and Leonard thereupon instructed Huber to keep on selling and keep an account of what he sold. Both appear to have assumed that the property was subjected to the assignment. Leonard left immediately for Detroit, and on reaching Decatur, a few miles from Marcellus, informed his principals, the firm of defendants in error, by telegraph, that Huber had assigned to Case. He reached Detroit the next morning, November 20th, and went to the store of the firm. Case had been up the river, and returned about noon of that day. Leonard at once handed the assignment to him and told him of his appointment, and he, without any delay or hesitation, assumed the trust and proceeded to Marcellus on the first train to carry it out. He took the precaution to subscribe an acceptance on the instrument. One of the reasons for his acceptance of the trust was his previous promise to Huber. Leonard states that he did not assume to act as Case's agent in taking the assignment, and did not assume to accept for him; that he acted for the firm.

The preparation of the assignment, and the execution and giving of it into Leonard's hands, and his departure for Detroit, preceded the levy of the attachment between two and three hours, and the arrangement between Huber and Case to meet the contingency of Huber's being unable to go on, occurred between two and three weeks earlier.

In the opinion of the court it results from these facts: That the assignment took effect as soon, at least, as the time when Leonard proceeded with it for Detroit. Huber had parted with the possession and control of it; and placed it unconditionally in Leonard's hands to be immediately subject to Case's disposal and with the design that it should pass the property presently. There was no qualification and no reserve. The actual transit of the paper from Huber to Case might occupy a few moments, or a few hours, but as the symbol of conveyance, it had gone beyond Huber's control. As Leonard represented the firm, he represented the entire membership of the firm, and through him the firm and its membership also

Evans et al. v. Alberts.

sanctioned what was done. Case was a member, and as such his sanction was given, and as such he was interested in having the assignment executed, and interested, presumably, in having it executed by himself. At the same time he was the firm nominee to execute it, and in view of the previous understanding between himself and Huber, we think he was in effect self-nominated. The fair import of that understanding was, we think, that in case there should be occasion he would act as assignee, and the proper sense of it was equivalent to an assent in advance. It was not necessary that an assignment should be mentioned in terms. The understanding manifestly referred to that kind of extremity in which an assignment is usually resorted to for the purpose of settling matters, and plainly contemplated the acceptance of that position by Case, which he would naturally have to take to settle up business in the ordinary course, namely the position as assignee. When Leonard started for Detroit with the instrument, it was in his hands with the concurrence of Huber and of the creditor firm of Charles Root & Co., and of the trustee, Case, in his character of member of that firm, and in his individual character, and in order that it might have operation and be fully executed.

According to this view the jury were justified in finding that the assignment took effect before the levy, and the judgment should be affirmed with costs.



HAMILTON COUNTY DISTRICT COURT—OHIO.

NOVEMBER, 1879.

Alberts was surety upon a debt due from David Evans to Goodall, contracted in January, 1873. In January, 1876, judgment was rendered against Alberts in favor of Goodall, a judgment having previously been rendered against the principal Goodall. In January, 1878, Alberts filed his petition against Evans and his wife, alleging that in June, 1873, Evans, without consideration, conveyed to his wife real estate which she held in trust for him, and sought to have it applied to the payment of the judgment.

Evans et al. v. Alberts.

Held. That the case does not fall within the provision of the code limiting an action for relief on the ground of fraud to four years, although the petition charged, that "Evans, being largely embarrassed and in failing circumstances, and with the intention of hindering and delaying his creditors," made the conveyance.

DAVID EVANS and ANN EVANS v. WILLIAM ALBERTS.

Error to Superior Court.*

BURNET, J.—On January 19, 1878, William Alberts, defendant in error, filed his petition in the Superior Court of Cincinnati against David Evans and Ann Evans, his wife, David Jones and William Goodall, alleging that on the 29th of December, 1874, Wm. Goodall brought his action in the Court of Common Pleas against David Evans, David Jones and said Alberts to recover a judgment upon a promissory note executed by David Jones and said Alberts as sureties, and by David Evans as principal; and that at the January Term, 1876, a judgment had been rendered against said Alberts and Jones as sureties, a judgment having been previously rendered against said David Evans, that Evans and Jones were insolvent, having no property subject to execution; that plaintiff owned valuable real estate in Cincinnati subject to the lien of Goodall's judgment against him which Goodall was about to subject to the payment of said judgment, to his irreparable injury; that the indebtedness on which the judgment was obtained was contracted in January, 1873; that said David Evans was then the owner of certain real estate in Cincinnati, described in the petition; and that on the 18th of June, 1873, being largely embarrassed and in failing circumstances, and with the intention of hindering and delaying his creditors, in the collection of their debts, he conveyed said real estate to one John A. Key, who the same day conveyed it to his wife, Ann Evans, who now holds the legal title; that though the consideration expressed in both deeds was \$5,000 in fact no consideration passed, but that the conveyances were made for the purpose of vesting the title in said Ann Evans, and that

Evans et al. v. Alberts.

she holds the property in trust for the use and benefit of said David Evans, and it ought to be subjected to the payment of his debts; and he asks that she may be decreed to hold said real estate in trust for defendant, David Evans, and it might be sold to pay the judgment.

To this petition David Evans and Ann Evans filed answers, but afterward, by leave of court, withdrew their answers and filed general demurrers, which were overruled, and the answers re-filed, and the cause being tried, a judgment was rendered in favor of the plaintiff, Alberts. A motion for a new trial being overruled, a bill of exceptions was allowed and filed, but has since been lost.

By agreement of counsel the case is presented in this court upon the alleged error of the Superior Court in overruling the demurrers to the petition; the other assignments of error, which depend for their solution upon the bill of exceptions, being waived.

It is claimed by the plaintiffs in error that the action was one of those described in the last clause of Section 15 of the former Code of Civil Procedure (under which code the action was brought), namely, an action for relief on the ground of fraud, and ought to have been brought within four years of the perpetration of the fraud; and that the petition alleges the alleged conveyances by which the title was vested in Ann Evans to have been made in June, 1873, whereas the petition was not filed until January, 1878—more than four years having elapsed, and that to avail himself of the saving, that the fraud was not discovered until within four years, the petition must affirmatively allege it.

If it appear upon the face of the petition that the action is barred by the statute of limitations, the defence may be made by general demurrer. But, as it seems to us, the defendants in error have mistaken the scope of the action, and it is not one for relief on the ground of fraud. The plaintiff, it is true, avers that the debt upon which he was surety for David Evans was contracted in January, 1873, and that Evans in June, 1873, after the contraction of the debt, "being largely embarrassed

Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

and in failing circumstances, and with the intent of hindering and delaying his creditors in the collection of their debts, made the conveyance without pecuniary consideration, although one was expressed in the deed. The circumstances under which the deeds were made are thus stated, and the intent to hinder and delay creditors is alleged; but there is no express allegation of fraud, nor is it sought to set aside the deed as fraudulent, nor to obtain any relief on account of fraud. On the contrary, the petition states that the deeds were made "for the purpose of vesting the title in said Ann Evans," and that she holds the same in trust for David Evans, and the property should be subjected to the payment of his debts, and the petitioner seeks relief by enforcing the trust in favor of Evans.

The case made in the petition, however inartificially stated, is one of an express trust ingrafted by parol upon a deed of land, and the relief demanded is that the court should so find, and then enforce in favor of a judgment creditor, in relief of a surety, whose property is about to be seized to pay his principal's debt.

The limitation of Section 15 of the Code does not apply, and the demurrers were properly overruled.

The judgment will be affirmed.

SUPREME COURT OF APPEALS OF VIRGINIA.

MARCH TERM, 1879.

1. A deed of trust is given in 1870, to secure a *bona fide* debt of ten thousand dollars, evidenced by four notes, payable in one, two, three, and four years, and conveys a tract of land with the crops then upon or thereafter grown upon the land until said notes are fully paid, all stock of horses, mules, cattle, sheep, and hogs, with the increase of the same then on the said land and thereafter placed on the same, and all farming implements used in the cultivation of the said land. *Held*, 1. The deed is not *per se* fraudulent on its face. 2. *Quære*: If the crops thereafter grown upon the land, or the increase of the stock, or other stock or implements afterward put upon the land, pass by the deed, and will be protected against subsequent execution creditors?
2. Pending a suit by judgment creditors to set aside the deed as fraudulent, the grantor makes a deed of quit claim to his creditors of all the prop-

 Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

erty conveyed in the deed: but the notes are not given up, nor is the deed of trust released. *Held*, That whether the trust is released depends upon the intention of the creditor; and in this case it was held upon the evidence there was no such intention.

3. A deed of trust to secure certain debts conveys certain real estate, and the grantor reserves in it, to himself and his family, all exemptions and property allowed by the Constitution of Virginia, and all laws passed in pursuance thereof, and in addition thereto, all exemptions allowed under the bankrupt laws. *Held*, The reservation is legal and valid.
4. L. brings an action on a bond against B., which is on the office judgment docket of the court at its March term, which commences on the third of the month, and the office judgment is confirmed on the fifth, which is the last day of the term of the court. On the first day of the same term of the court B. goes into court, and confesses a judgment in favor of S., no suit having been instituted against B. by S. *Held*, 1. The judgment in favor of S. is valid, though no suit has been instituted by him against B. 2. That the judgment of L. relates back to the first day of the term, and the law not regarding a fraction of a day, both judgments stand as of the same date.

*BROCKENBROUGH'S Executrix et al. v. BROCKEN-
BROUGHS Administrator et al.*

*George Walker and Jones & Son, for the appellants.
Jones & Bouldin, for the appellees.*

THIS was a suit in equity in the Circuit Court of Richmond County, brought in March, 1874, by Lucy C. Brockenbrough, executrix of Littleton Brockenbrough, deceased, and Ferdinand Shackleford, administrator of Thomas R. Shackleford, deceased, judgment creditors of John M. Brockenbrough, to set aside as fraudulent three deeds of trust made by the said John M. Brockenbrough. The creditors secured, as well as John M. Brockenbrough, answered, denying the fraud.

The first of these deeds bears date the 26th of October, 1870, and by it John M. Brockenbrough and Austina, his wife, for the purpose of securing the payment of four notes therein described, due to J. M. Parr, of Baltimore, conveyed to Thomas Croxton, a tract of land called the Island, and personal property, etc. It appeared very clearly from the evidence that Parr lent to Brockenbrough ten thousand dollars at twelve *per cent.* interest, and the notes mentioned in the deed were given for that loan; and certainly as to him and the trustee, Croxton, there was no fraudulent intent; and as to Brockenbrough,

Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

there was no evidence of fraud unless it was to be inferred from the provisions of this and subsequent deeds.

The second deed bore date the 28th of February, 1873, and by it John M. Brockenbrough conveyed to T. R. B. Wright, a farm called the Cottage, containing two hundred and eighty-four acres, in trust to secure to Lucy C. Brockenbrough, executrix of Littleton Brockenbrough, deceased, three thousand four hundred dollars due by bond, and to F. Settle, superintendent of the poor, and his successors in office, one thousand three hundred and twenty-seven dollars and fifty-six cents, with interest from 1st of February, 1872, due by bond. And the said Brockenbrough reserved to himself the right to and use of said property until the 1st of January, 1877, unless he, the said Brockenbrough, shall consent to a sale at an earlier day; and upon the further trust that the said Wright, with the consent of the said Brockenbrough, shall sell at any time; but after the 1st of January, 1877, if payment is demanded by said creditors, upon the terms and in the manner prescribed by Section 6, Chap. 117, Code of Virginia, in all respects, except that it shall not be for cash, but upon such terms as are provided for in the Act of the General Assembly, entitled an act to regulate judicial sales, and prevent a sacrifice of property, approved July 11, 1870. And upon the further trust that the said Wright, with the consent and under the direction of said Brockenbrough, shall, at any time, sell the said tract of land in part or in whole, as said Brockenbrough might deem most expedient, and also cut and sell any wood and timber, and appropriate the proceeds of the same, as well as the rents and profits, to the payment of the debts secured. And it is expressly covenanted and agreed by the said Brockenbrough, that he reserves to himself and family all exemptions and property allowed by the Constitution of Virginia, and all laws passed in pursuance thereof, and in addition thereto, all exemptions allowed under the Bankrupt Law. This deed was admitted to record on the 6th of March, 1873.

By deed of the same date as the last named, the said John M. Brockenbrough, reciting that his wife Austina had united

Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

with him to convey all her right and interest in certain lands mentioned, devised to her by her father, and also in conveying her contingent right of dower in the Island, and that it was agreed between them that in lieu thereof, he should settle upon her for her benefit certain other property of adequate value and amount. And, whereas, her brother, Austin Brockenbrough, did by his will give to said Austina personal property to the amount of six thousand dollars, which, with interest, now amounts to eight thousand dollars, to be made over to her by her husband by deed, which said sum has been received by the said John M. Brockenbrough, he, in consideration of the premises and the further consideration of the natural love and affection which he, the said John M. Brockenbrough, has for his wife, conveys to T. R. B. Wright, his farm called the Cottage, after payment of the debts due Lucy C. Brockenbrough and F. Settle, also his interest in the Island, subject to the payment of the debt to Parr, with all crops, houses, etc., etc., in trust for the use and benefit of himself and wife, and in no way subject to his debts, during their joint lives and the life of the survivor, and then to their children.

It appears that the plaintiff, Lucy C. Brockenbrough, had brought a suit on the bond held by her against John M. Brockenbrough, and that at the March term of the County Court, which commenced on the third day of the month, she recovered a judgment against him. And she refused to accept the deed executed for her security.

It appears further, that Settle had not instituted an action on the bond due to him, but on the first day of the March term of the court, Brockenbrough went into court and confessed a judgment for the amount of the bond, without any process having issued against him. And upon this ground the plaintiffs, in their bill, contested the validity of his judgment.

It appears further that the tract called the Island was devised by Moore F. Brockenbrough to his five sons. That under a decree for partition of the land in 1853, the commissioners allotted the whole tract to B. W. Brockenbrough, who agreed to take the same at the valuation put upon it, and he conveyed

Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

it to Richard H. Harwood and others, in trust to secure to the several parties interested in the property their proportions of the purchase-money. One of these parties was John M. Brockenbrough, and another was Littleton Brockenbrough, the testator of the plaintiff, Lucy C. Their shares were each five thousand five hundred and ninety-five dollars and eighteen and three-quarter cents. Another share of the same amount was due to Edward Brockenbrough, who seems to have died previous to the year 1870.

By deed dated the 30th of August, 1870, B. W. Brockenbrough, in consideration of the payment of all debts due by him to Edward Brockenbrough, deceased, as well as the payment by J. M. Brockenbrough of the liabilities incurred by the said B. W. Brockenbrough on account of the Island property, the release of all demands held by the said J. M. against the said B. W. Brockenbrough, in any way, and of the further consideration of three thousand two hundred and fifty dollars paid to the said B. W. by the said J. M. Brockenbrough, conveyed to the said J. M. Brockenbrough the tract of land called the Island, with all the personal property thereon, and his; the said B. W. Brockenbrough's interest in the estate of Edward Brockenbrough, deceased.

In the progress of the cause, the court directed commissioners to ascertain and report what moneys are still unpaid and due by B. W. Brockenbrough as purchaser of the farm called the Island, and to whom the said moneys are due, and also what liens, whether by deeds of trust or otherwise, there are upon the realty and personalty mentioned in the complainants' bill, and any other matter deemed pertinent by him, or that he may be requested to report specially by any party in interest.

In pursuance of this decree, the commissioner made a report of the debts of J. M. Brockenbrough, which were liens, and their priorities. The first is a judgment recovered by Thomas Shackelford on the 8th of April, 1867, for three hundred dollars of principal, interest and costs one hundred and fifty-four dollars and fifteen cents. The second is the four notes due J. M. Parr, secured by deed to Croxton, amounting

Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

to one hundred and thirty-two dollars and forty cents. He states the judgment of Settle as of March 3, 1873, the first day of the court, and that of Mrs. Lucy C. Brockenbrough as of the 5th of March, the last day of the term, when the office judgment was confirmed.

The amount due by B. W. Brockenbrough on the purchase of the Island farm, and secured by deed of trust to Harwood and others, principal and interest eleven thousand eight hundred and sixty dollars and eighty-eight cents, to Edward Brockenbrough, and to Wm. F. Brockenbrough a balance of two hundred and eighty-six dollars and seventeen cents. John M. Brockenbrough was the administrator of Edward Brockenbrough, and the estate was debtor to him on his administration account one thousand and forty-eight dollars and three cents, and the other outstanding debts of Edward not paid were four hundred and seventy-five dollars and seventy-six cents. The commissioner also makes what he calls an approximate estimate of division of the estate of Edward Brockenbrough, and after deducting the outstanding debts, including the amount due the administrator, and the expenses of collecting the fund, he makes the amount for division ten thousand and thirty dollars and eighty-eight cents. One-sixth of which, one thousand six hundred and seventy-one dollars and eighty-one cents, was due to B. W. Brockenbrough, W. W. Brockenbrough, John M. Brockenbrough, Robert Knox and wife, and W. R. Aylett and wife, and one-sixth was due to the three children of Littleton Brockenbrough, each the sum of five hundred and ninety-seven dollars and twenty-seven cents.

While the cause was pending in the court, and after the commissioner had settled the accounts as before stated, the plaintiffs filed a supplemental bill, in which, after referring to these accounts, they charge that since the filing of their bill, the debt to Parr secured by the deed to Croxton, had been paid off and satisfied by John M. Brockenbrough, and that he has been discharged of the same by the said Parr, and the notes specified in said deed of trust have been surrendered to said Brockenbrough, but that Croxton has not executed to Brocken-

Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

brough a deed of release, but still holds the legal title to the property specified in said deed ; and making John M. Brockenbrough, Parr and Croxton parties defendants to the bill, they pray that the property may be sold for the payment of their debts, and for general relief.

Croxton and Parr answered the supplemental bill ; Croxton denied the allegations of the bill, that the notes due to J. M. Parr, and secured by the deed of trust, had been satisfied by J. M. Brockenbrough. Respondent had advertised for sale the Island and other property to satisfy said notes, and the sale was enjoined. In this state of matters Brockenbrough made and executed a deed of quit claim to the Island and certain personal property mentioned in said deed of quit claim, and put said Parr in possession of the same until the court shall have settled the question of the validity of various claims sought to be enforced against said property, some of which existed by virtue of a deed of trust made by B. W. Brockenbrough many years before the deed to respondent was made. The sole interest of J. M. Brockenbrough was his equity of redemption and possession, the value of the first to him being nothing ; no sale could be made on account of the interdict of the court, and when that should be removed, this respondent, as well as Parr, knew that liens to the amount of from five to six thousand dollars at least, existed ahead of his claim for the notes due said Parr ; the possession of the land was valueless to Brockenbrough, because of his inability to cultivate it, and hence he was anxious for a sale ; but as he could not sell, he made the deed and quit claim to his largest creditor. He avers that no sale of the Island and other property has ever been made, nor has respondent ever heard of any arrangement to make a deed of release or surrender of the notes secured in the trust to him ; certain it is, that nothing of the sort has been done.

Parr denied that Brockenbrough had paid the notes given him by Brockenbrough and secured by the deed of trust. Up to October 13, 1874, Brockenbrough had paid him seven hundred and ninety-two dollars and thirty-eight cents, arising

Brockenbrough's Exr's et al. v. Brockenbrough's Adm'r et al.

from sales made from the Island, as he understood, and that was all.

The deed from J. M. Brockenbrough to Parr bears date the 16th of November, 1874, and in consideration of the sum of five dollars, Brockenbrough doth grant, sell, convey, and forever quit claim unto the said Parr all his right, title, and interest in the farm called the Island, with the following personal property, specifying it.

Several witnesses were examined as to what had been said by Brockenbrough and Croxton in relation to this transaction.

The cause came on to be heard on the 25th of November, 1875, when the court held that the deed of trust made by J. M. Brockenbrough and wife to T. Croxton for the benefit of J. M. Parr, was good against all creditors seeking to establish liens upon the farm called the Island, except those named in the commissioner's report, secured in the deed of trust made by B. W. Brockenbrough to Harwood and others, and it appearing from receipts filed, that W. F. Brockenbrough, W. R. Aylett and wife, the heirs of Littleton Brockenbrough, and Knox and wife, have been paid the sums reported due them in said report, and it being the opinion of the court that the claims reported as due J. M. and B. W. Brockenbrough passed under the deed to Croxton; and it further appearing that J. M. Brockenbrough has, since the death of his wife, made to J. M. Parr a deed granting all his interest in said Island farm, the injunction awarded in the case of *Schackleford v. Croxton*, etc., is dissolved.

The court was further of opinion that the personal property of J. M. Brockenbrough, not in existence on the Island farm at the date of the deed to Croxton, embraced in the deed to J. M. Parr of November, 1874, except such as was substituted or exchanged for that then on the said farm, is liable to the execution lien of B. W. Brockenbrough; and it was ordered that one of the commissioners of the court should ascertain and report what personal property passed under the deed from J. M. Brockenbrough to Parr of November, 1874, not embraced in said deed to Croxton, or substituted or exchanged therefor.

Comfort, Tr., v. Patterson.

The deed to T. R. B. Wright having created interests in the Island farm which could not and did not pass under the deed from J. M. Brockenbrough to J. M. Parr, it is ordered that said Croxton, trustee, proceed as directed by the deed from Brockenbrough and wife to him, to sell said land and report his proceedings to the court. And the court further orders that J. M. Parr surrender to J. M. Brockenbrough the notes taken and secured in the deed to Croxton, trustee. And the trustee, Wright, was directed to proceed to sell the Cottage farm embraced in the deed of trust to him, and report to the court. The plaintiffs thereupon applied to a judge of this court for an appeal; which was allowed.

BURKS, J., delivered the opinion of the court.

Held as stated in the head-notes.

Decree affirmed.

SUPREME COURT—TENNESSEE

SEPTEMBER TERM, 1879.

The clerk and master of the chancery court kept a deposit account at a bank in his name as "C. and M.," consisting partly of his individual money, partly of money collected by him officially but belonging to the suitors of the court, entered to his credit without discrimination, and on which he was in the habit of checking for his individual purposes. *Held*, Upon the insolvency of the bank, and an assignment of its assets in trust for creditors, that so much of the deposit as belonged to the depositor individually, could be set off against a debt due by him personally to the bank by note in the hands of the trustee; and the evidence showing a recent individual deposit of a much larger sum than the balance of the note, it was further held that the presumption in the absence of all the evidence to the contrary, would be that the individual interest of the depositor was sufficient to set off such balance.

In such case it seems the title and control of the deposit would be so far in the depositor personally, that the addition of his official title would be a mere *descriptio personæ* not altering the rights of either party.

COMFORT, Tr., v. PATTERSON.

COOPER, J.—On the 4th of April, 1877, the Commercial Bank of Tennessee became insolvent and made an assignment

Comfort, Tr., v. Patterson.

of its assets for the benefit of creditors, the complainant being the successor of the first trustee.

At the time of its suspension the bank was indebted to the defendant as a depositor in the sum of five thousand five hundred and seventeen dollars and seventy-five cents, the account being kept in the name of "M. L. Patterson, C. and M.," he being clerk and master of the chancery court. The deposits in the account consisted partly of Patterson's individual money strictly, partly of the costs earned to which he was entitled, and partly of the funds received officially, and for which he was accountable as clerk and master.

On the 19th of March, 1877, he deposited to this account fifteen hundred dollars of his individual means. Two days before the bank had discounted for him a note for one thousand dollars, the proceeds of which were not paid, but simply passed to the credit of the same account. The defendant was in the habit of checking against this account for his individual purposes. He kept the funds of his office deposited at other banks at Knoxville, as well as this bank. At the time of the suspension of the bank, the defendant held three certificates of deposit against the bank, which had been previously transferred to him, aggregating less than the face of the note. It is conceded that these certificates are a proper set-off against the note; and the only question raised by the record is whether the residue of the note can be met by a set-off of so much of the deposit.

The assets of an insolvent moneyed corporation, under our statutes and decisions, become, from the date of assured insolvency, a trust fund for the benefit of creditors in the order prescribed by law, and otherwise *pro rata*. (*Marr v. Bank of West Tenn.*, 4 Cold., 471; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch., 737.) But the assets would only be the balance of debt due from the debtor at the date of insolvency, after deducting any just credits or set-off. It is only what remains after a just settlement of mutual debts, which becomes a trust fund for distribution. (*Mosely v. Williamson*, 5 Heisk., 278.) The certificates of deposit held by the defendant as as-

Comfort, Tr., v. Patterson.

signee of the depositors were therefore, beyond all question, a proper set-off to the note of the defendant, held by the trustee as assignee of the bank. And for the same reason, so much of the deposit of five thousand five hundred and seventeen dollars and seventy-five cents as belonged to the defendant individually, would, as between him and the trustee, be also a just set-off to the residue of the note. The record does not ascertain the exact amount of this part of the deposit. It does, however, show, that a part of the funds were thus owned by the defendant, and that he had recently deposited to the account the proceeds of the note itself, and fifteen hundred dollars in addition of his individual means. These facts are sufficient to throw the burden of proof on the complainant to show, as could easily be done, the withdrawal of these individual funds. In the absence of such proof we may safely assume that the defendant's individual share of the fund is sufficient to satisfy the residue of the note.

Under these circumstances it is hardly worth while to determine authoritatively whether the defendant might not also set off, if necessary, against his note, enough of the deposit derived from official collections, and which the suitors of the court might be able to follow. We have no law directing or authorizing the clerk and master of a court to deposit in bank moneys held by him *virtute officio*, and there can scarcely be a doubt that the title and control of such funds, upon a general deposit in his name as clerk and master, without any designation of the case or the party entitled, would be so far in him personally, that the addition of his official title would be a mere *descriptio personæ*, not altering the rights of either party. (*Miller v. Receiver of Franklin Bank*, 1 Page, 444.) At any rate in this case the official funds were blended with his own funds.

Affirm the decree with costs.

In re Shaw et al.

SUPREME COURT—NEW YORK.

MAY GENERAL TERM, 1879, THIRD DEPARTMENT.

Where an assignment for the benefit of creditors contained a provision that the assignees should receive "a reasonable commission or compensation for their own services in executing the trust."

Held, That they were not entitled to be allowed the actual value of their services, but were restricted to the same commissions as are by law allowed to executors and administrators.

In the matter of the final accounting of ALEXANDER SHAW and SAMUEL GRAHAM, Assignees of J. McMURRAY & BRO., Insolvents, Appellants.

THIS was an appeal from an order of the Special Term, fixing the assignees' compensation at the amount allowed by law to executors and administrators.

Adee & Shaw, for appellants.

Abram C. Crosby, for creditors, respondents.

BOARDMAN, J.—The assignees of the insolvent debtors were allowed, upon their accounting, the same commissions as by law are allowed to executors and administrators. The language of the assignment in that behalf is as follows: "To pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with a reasonable commission or compensation to the assignees for their own services in executing the said trust." Under this clause the assignees claimed they were entitled to be allowed the actual value of their services, and were not restricted to executors' commissions. They appeal from the decision of the Special Term.

I think the decision of the court was right, and that the appellants were only entitled to the same fees or commissions as are allowed executors and administrators. A long and uniform course of decisions in this State has so established the law. Walworth, Ch., in *Meacham v. Sternes* (9 Paige, 399-403), says

In re Shaw et al.

of the fees of an assignee of an insolvent debtor: "The trustee in this case, and other trustees similarly situated, are entitled to the same compensation for their services which is allowed by law in the case of executors," etc.

Judge Bronson, in *Barney v. Griffin* (2 N. Y., 372), says of an insolvent's assignment: "If the debtor can provide for anything more than the necessary expenses of executing the trust, I think he cannot go beyond the commissions allowed by law to executors, etc., for similar services." In *Nichols v. McEwens* (17 N. Y., 22) an assignment was declared void which provided for greater commissions and pay than is allowed to executors, etc., and the rule above cited from *Barney v. Griffin* is approved of. In *Campbell v. Woodworth* (24 N. Y., 304), a case very like the one before us, the court holds the just and reasonable compensation for the services of the assignees to mean the commissions allowed by law to executors, and that such commissions are the reasonable compensation in all cases.

To the same effect is *Jacobs v. Ramsen* (36 N. Y., 668); *Duffy v. Duncan* (35 id., 190); *Ogden v. Murray* (39 N. Y., 202); *Ireland v. Potter* (25 How., 177); *Wagstaff v. Lowerre* (23 Barb., 244).

Against this array of authority the appellants cite and rely upon the case *In the Matter of Schell, trustee* (53 N. Y., 263). That, however, was a case arising under a will, and Schell had been appointed trustee in place of the trustee named in the will. It was held that provision was made by the will for paying the trustee the actual value of his services, to be determined as in ordinary cases upon an employment *inter vivos*. The case is quite different from that of an assignee of insolvent debtors, and does not profess to overrule any of the cases cited. The testator may give any compensation he pleases, and no injustice can be done to any creditor thereby.

An insolvent debtor, as we have seen, may not select an assignee and fix his compensation beyond the reach of his creditors. As to him, the law fixes the compensation of his assignee, and injustice cannot be done by selecting persons whose

Ginther et al. v. Richmond.

services may be of great value, and providing for their payment at the expense of suffering creditors.

The assignment in this case was not void, because the reasonable commission for services means no more than the commissions fixed by law. (*Campbell v. Woodworth*, supra.)

To the same effect was the decision of this court in *Chase v. James*, opinion by Learned, P. J., November Term, 1879 (16 Hun, 14), when language entered in referee's minutes of trial, as follows: "Referee may charge the fair value of his services," was held to mean three dollars per day, because the Legislature had fixed that as the fair value of a referee's services, and that rate would control unless another was specially agreed upon.

The order of the Special Term should be affirmed, with ten dollar costs, and expenses of printing to be paid by appellants to respondents.

Present: Learned, P. J., Boardman and Bockes, JJ.

Order affirmed.

SUPREME COURT—NEW YORK.

JUNE GENERAL TERM, 1879, FOURTH DEPARTMENT.

An assignment for the benefit of creditors is not void because it in terms gives to the assignee power to compromise or compound claims in favor of the estate; nor because it does not directly authorize the assignee to convert all the assigned property to pay debts, the assignment in question authorizing a sale of "all or any part of the said property."

*JACOB GINTHER and ISAAC A. WILE, Assignees,
Respondents, v. HENRY E. RICHMOND, Appellant.*

THIS was an appeal from an order of the court below, denying a motion for a new trial on the judge's minutes.

Plaintiffs sued to recover property from the defendant, a sheriff, claiming title thereto under an assignment for the benefit of creditors. This was resisted upon the ground that the assignment was fraudulent and void for reasons stated in the

Ginther et al. v. Richmond.

opinion. Plaintiffs obtained a verdict. The following is a copy of the assignment:

GEORGE C. GINTHER and CHARLES J. OAKLEY, To JACOB GINTHER and ISAAC A. WILE, General Assignment.

This indenture, made this 29th day of July, 1878, between George C. Ginther and Charles J. Oakley, constituting the firm of "Ginther & Oakley," of Rochester, New York, of the first part, and Jacob Ginther, of Buffalo, New York, and Isaac A. Wile, of said Rochester, of the second part, witnesseth:

Whereas, the parties of first part are indebted to various parties and firms in divers sums of money, which they are unable to pay in full,

Now, therefore, in consideration of the premises and of the sum of one dollar to them paid by the parties of the second part, they, the said parties of the first part, do hereby sell, assign, and transfer, unto the parties of the second part, all and singular the goods, chattels, property, and choses in action of every name and nature, except such property as may be exempt by law from execution, whether owned by them jointly as a firm, or by each of them individually.

To hold the same unto the said parties of the second part, upon the trusts following, viz.:

First. To pay the costs and charges of these presents, and the expense of executing the trusts hereby declared.

Second. To distribute and pay the remainder of said property, and the proceeds of all sales thereof, unto and equally between all the creditors of the parties of the first part, provided, however, that if there is not sufficient funds for payment of all debts of parties of first part in full, then said debts are to be paid pro rata, or in proportion to their respective amounts, without distinction or preference.

The rest and residue (if any there be), after paying all said costs and debts as aforesaid, shall be paid over to parties of the first part.

The parties of the second part are hereby empowered to

Ginther et al. v. Richmond.

sell all or any part of said property, and to receive and collect all accounts and choses in action due to parties of first part, with the right to compromise or compound any claim by taking a part for the whole, where they shall deem it expedient so to do.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

GEORGE C. GINTHER,
CHARLES J. OAKLEY.

We hereby accept the above trust reposed in us.

Dated this 29th day of July, 1878.

JACOB GINTHER,
ISAAC A. WILE.

D. B. Beach, for appellant.
Wile & Wile, for respondents.

HARDIN, J.—The assignees are given the right “to compromise or compound any claim by taking a part for the whole, when they shall deem it expedient so to do.” It must be conceded that this clause confers a power and discretion upon the assignees to compromise debts in the discretion of the assignees. Does this authorize or require, in express terms, an illegal act to be done? If it does not, it cannot be held to invalidate the assignment.

(*Benedict v. Huntington*, 32 N. Y., 219; *Townsend v. Stearns*, 32 id., 209.) Certainly the assignees are not “required” to compromise any claim. They are only given a discretion “to compromise or compound . . . where they shall deem it expedient so to do.” This discretion could be exercised as to doubtful debts, and, if so exercised, it would be just what assignees would, like other trustees, be authorized to do by law.

The Act of 1877, Section 23, Chapter 466, and amendment of 1878, Chapter 318, contains a provision authorizing the county court, “on such terms as it may direct,” to “authorize

the assignee to compromise or compound any claim or debt belonging to the estate of the debtor." . . . The use of the words "any claim" cannot reasonably be interpreted to authorize the court to give power to the assignees to compromise a good debt against a perfectly solvent debtor. Yet, such a construction of the words of the statute would be just as reasonable as the like construction of the words of the assignment before us. It is a well settled rule of construction that such interpretation should be given to an instrument or statute as would make it consistent with innocence; and the general rules of law, in preference to one which would impute a fraudulent intent to the grantor, or defeat the general purpose and spirit of the law. (*Rapalee v. Stewart*, 27 N. Y., 315.) The doctrine of Lord Coke, as stated by Porter, J., in *Townsend v. Stearns* (*supra*), is applicable. Coke says:

"Whensoever the words of a deed or of the parties without deed may have a double intendment, and one standeth with law and right, and the other is wrongful and against law, *the intendment that standeth with law shall be taken.*" The 23d Section of the Act of 1877 also contains a provision that any authority given by the county court to compromise "shall not prevent any party interested in the trust estate from showing, upon the final accounting of such assignee, that such debt or claim was fraudulently or negligently compromised." This provision enables us to see that the authority to compromise, derived from the county court, is not conclusive in any case. This is made clear by this further provision of the section, to wit: "And the assignee shall be *charged with, and be liable for*, as part of the trust fund, *any sum which might or ought to have been collected by him.*"

This language is broad enough to establish the liability for any loss occasioned by an improper use of the authority derived from the statute, or even of the assignment, if such assignee should by its use occasion a loss to the "trust fund" of "any sum which might or ought to have been collected by him." Thus, we see that the assignee has not power, under the assignment or under the statute, to compromise any "debt or

Ginther et al. v. Richmond.

claim" in such cases as would "fraudulently or negligently" occasion loss to the trust fund.

We may, therefore, assume that the 23d Section of the Act of 1877 is cumulative, without so deciding in this case. We may conclude that the provision quoted from the assignment does not require us to impute a fraudulent purpose on the part of the assignors, and that it does not appear "that the clause in question is in plain violation of the law." (Porter, J., 32 N. Y., 215; *Matter of Nicholas*, 15 Hun, 317.)

It is next insisted that "the assignment is void, because it nowhere directly authorizes, empowers, or requires the assignees to convert all the assigned property into money to pay debts." The words authorizing a sale of "all or any part of said property," are proper words to vest in the assignee's power to sell all, if need to pay debts; to sell part only, if that will pay the debts. Surely, if part would pay the debts in full, no creditor could have any interest in having the whole sold.

The language of the entire instrument being construed, we find, first, a transfer of the debtor's property; second, a trust created; third, for the purpose of paying debts; fourth, full power given to sell any or all of the property to fully execute the trust reposed in the assignees. There is no intent evinced to have the assignees set up a discretion which would hinder or delay the creditors. The words of the assignment do not justify us in imputing to the assignors any such *intent*. We are referred to the case of *Rapalee v. Stewart* (27 N. Y., 310), but it has no application to this assignment. There the language was "to be converted into cash or *otherwise disposed of* to the best advantage," by the assignees, and it was very properly held that the intent was to authorize the assignees to sell on credit, and the assignment was held void. No such purpose to hinder or delay creditors appears from the terms of the assignment before us.

The assignees, by accepting the trust, became obligated to carry it out, and the obvious purpose of the assignors was to authorize a sale of so much of their property as would *produce* proceeds sufficient to pay their debts in full, or to sell the

Chalfont v. Grant.

whole and pay *pro rata* all of the proceeds thereof. The duty was clearly imposed by the terms of the assignment. The 11th Section of the Act of 1877 would enable any creditor to call the assignees to account and to enforce the execution of the trust.

We must, therefore, conclude that the assignment upon its face was not fraudulent and void.

The order should be affirmed.

TALCOTT, P. J., and SMITH, J., concurred.

Order affirmed.

SUPREME COURT OF TENNESSEE.

SEPTEMBER TERM, 1879.

The creditors of a firm have the right to follow the firm assets into land bought with the purchase-money of other land in which the assets were first invested, and the partner making the investment cannot claim a homestead exemption in such land as against the firm creditors.

CHALFONT v. GRANT.

COOPER, J.—The defendants, J. M. Grant and his two sons, were partners in business as merchants, and failing, sold their stock of goods, receiving in part payment a house and lot, and J. M. Grant occupied the premises with his family. Two years afterwards he sold and conveyed this property, his wife joining in the deed, on the express agreement that the proceeds of sale, nine hundred dollars, should be used in purchasing a house in the country for the family. The place in controversy was accordingly bought, and paid for with the money, the title being taken in the name of the wife. The complainants are judgment creditors of the firm, and seek to reach the land for the payment of their debts. The house and lot having been bought with partnership assets, it is not disputed that the complainants would have the right to follow these assets into the property. It is argued, however, that the right goes no further, and that the creditors could neither reach the money arising from the sale of the lot, nor the land purchased therewith.

Gibbs v. Patton.

In support of this position, *Tubb v. Williams* (7 Hum., 367) is relied on. But if the language of the learned judge in that case was ever intended to convey such a meaning, which may be doubted, it has been expressly overruled in *Lazell v. Powell* (Thomp. cases, 198). And since the Act of 1832, ch. 11 (Code, 4282-4287), stocks, choses in action and money due may be reached in equity by judgment creditors, and of course property in which it may be invested. And we have held at this term, that there is no right of homestead in partnership property.

Affirm the decree.

SUPREME COURT—TENNESSEE.

JACKSON, APRIL TERM, 1879.

A homestead cannot be claimed against creditors in realty fraudulently conveyed by the husband to the wife, if at the date of the conveyance the husband and wife were occupying other property as a homestead.

Where, at the date of the fraudulent conveyance, the husband and wife occupy as a homestead the adjoining property of less value than one thousand dollars, but have removed from it at the time the bill is filed to set aside the fraudulent conveyance, a subsequent reoccupancy of the adjoining premises will not entitle them to a part of the land fraudulently conveyed sufficient to make out the value of one thousand dollars.

GIBBS v. PATTON.

COOPER, J.—On February 19, 1873, A. H. Patton, for the nominal consideration of four dollars, conveyed to his wife, Mary A. H. Patton, all his property, consisting of four parcels of land, separately described. One of these was the lot on which he was then residing with his family, known as the McBride place; another was a lot in the city, on which was a storehouse; another was an improved lot of seven or eight acres; and the fourth consisted of twelve acres, adjoining the other, and fenced in with it. Afterward, during the year 1873, Patton sold the first two of these lots, and moved with his family on the third lot about the 1st of December, 1874. On February 10, 1874, Patton and wife joined in a deed con-

Gibbs v. Patton.

veying the twelve-acre lot to F. J. Edwards, on the recited consideration of one thousand dollars. On February 2, 1875, Edwards, reciting the same consideration, made a quitclaim deed of this land back to Patton and wife. No consideration in fact passed between the parties on either occasion. About the first of the year 1875 Patton removed with his family to a rented farm, returning to the Patton place in July or August of the same year. On the 28th June, 1875, the complainant, W. B. Gibbs, as a creditor of A. H. Patton, filed this bill for the purpose of subjecting to the satisfaction of his demand the tract of twelve acres above mentioned, upon the ground that the several conveyances thereof were without consideration, fraudulent, and void as to creditors. Patton and wife claim a homestead in the lot on which they reside, and insist that they are entitled to extend the homestead claim to so much of the twelve-acre lot as may be necessary to make up the value of the homestead exemption to one thousand dollars. The chancellor, by the final decree, appointed commissioners to lay off the homestead in both lots if necessary, and ordered the surplus land and the remainder interest in the homestead to be sold on time, free from the equity of redemption, to satisfy the complainant's demand, setting aside the various conveyances as fraudulent and void. Patton and wife took a special appeal from so much of the decree as ordered a sale of the remainder interest in the homestead land and as directed the sale to be free from the equity of redemption. The complainant has brought the case up by writ of error.

The invalidity of the conveyance as to complainant is conceded. The contest has been narrowed down to the extent of the homestead right, and the sale of the remainder interest therein and the terms of sale.

The bill is so framed as to limit the complainant's relief entirely to the lot of twelve acres. The right of the defendants to a homestead in the adjoining lot on which they reside is not in question. Whether the homestead right is lost by a fraudulent conveyance by the husband to the wife is one of the innumerable vexed questions to which the homestead law has given

Gibbs v. Patton.

rise. This State has ranged itself with those States which hold that such a conveyance estops the husband and wife from claiming a homestead in the premises conveyed. (Thompson on Homesteads and Exemptions, Sec. 408, note; *McClung v. Johnson*, 2 Law and Equity Reporter, 78.) The most satisfactory reason for the opposite conclusion is, that the homestead being exempt from creditors, the latter cannot be injured by any disposition which may be made of it, and cannot therefore predicate fraud of any conveyance of the property. It is upon this ground that the English doctrine rests, that, in order to make a voluntary conveyance void as to creditors, it must transfer property which would be liable to execution. (1 Story Eq. Jur., Sec. 367.) It is obvious that this doctrine can only apply to homesteads when the creditor is seeking to reach the property in which the husband and wife had a homestead at the time of the fraudulent conveyance. It can have no application to property not occupied as a homestead at the date of the conveyance. The property subject to the demands of creditors when conveyed stands in the same attitude when the conveyance is set aside. The homestead was not in any part of the twelve acres at the date of the fraudulent conveyance. Besides, the proof shows that Patton, during the first part of the year 1875, was not actually occupying the adjoining premises, and that he did not return to these premises until after the filing of complainant's bill. The previous occupancy of these premises, while it might sustain the homestead right therein, notwithstanding a temporary absence, would not extend to the twelve acres of which he was not then the owner. It is not a case for the extension of the doctrine of occupancy by relation. (*Wade v. Wade*, 2 Tenn. Leg. R., 10.)

The complainant having asked in his bill for a sale of the property free from any equity of redemption, he is clearly entitled to it, unless it may be a very exceptional case, and such a case must be made out to sustain an appeal for the purpose of modifying a decree in that regard. No such circumstances exist in this case.

Decree in conformity to this opinion.

Carr et al. v. Breese.

SUPREME COURT—NEW YORK.

MAY GENERAL TERM, 1879, THIRD DEPARTMENT.

The transfer of property by a husband to his wife without consideration, for the purpose of placing it beyond the reach of future creditors, held fraudulent and void as to such future creditors.

DAVID CARR and HARMAN A. BLANCHARD,
Respondents v. ELLEN and WILLIAM H. BREESE,
Appellants.

THIS was an appeal from a judgment entered against the defendants in an action brought against them to set aside a conveyance on the ground of fraud, a judgment against the defendant William H. Breese having been previously recovered and an execution thereon returned unsatisfied.

In 1871, William H. Breese purchased a house with the proceeds of the sale of two houses which he then owned, and which constituted the principal portion of his property, taking the title to the house so purchased in his wife's name. He had been actively engaged in business for several years, during which he had received credit from plaintiffs. The action brought against him individually was for goods sold and delivered to him in his business by plaintiffs, on credit. He became insolvent in 1875.

R. A. Parmenter, for appellants.

Edgar L. Fursman, for respondents.

BOCKES, J.—The learned referee, on the facts proved before him, applied to the case the sound principle of law, that a husband's transfer of his property to his wife, without consideration, with a view to place it beyond the reach of his future creditors, was fraudulent as to such future creditors, when his purpose by such act was to throw upon the latter the hazard of his future success in business. This just principle has been frequently declared, and it stands upon the same ground as that applied to a fraudulent transfer of property to defeat the honest claims

Carr et al. v. Breese.

of creditors existing at the time of the transfer. It is quite apparent that the husband intended to save his property in the hands of his wife, at the expense of his creditors, in case calamity should come to him in his future business, which he proposed to conduct, and actually did conduct on credit; and the case shows that his indebtedness increased continually and rapidly from the time his wife took the title until his financial collapse. He turned over to her, by investing her with the title, the bulk of his entire property. He retained title in himself to a very insignificant part of it, or mere fragment of it, which proved substantially, if not wholly, valueless to his creditors as a fund from which they could obtain satisfaction of their claims. Indeed, it is quite manifest that he did not retain even sufficient to satisfy, on compulsory sale, the debt and demand that the plaintiffs then held against him. There was no special reason for having the title to his property turned over to his wife, save to place it beyond the contingencies attendant upon the continuance of his contemplated business. A husband out of debt may make suitable settlement upon his wife from his estate, and when done with no dishonest intent, the wife will be protected in her settlement against the claims of the future creditors of the husband. But, to invest the wife with title to the husband's entire property, or with title to very nearly all of it, when in business, intending to continue the business, can be considered in no other way than as unsuitable and suspicious.

It gives reason for a belief of a sinister intent. Had the husband owed the plaintiffs the demand here sought to be enforced, at the time his wife took title to his property, no consideration having been paid by her, the transaction would have been deemed fraudulent in law as against those parties and their claim. Is the property then beyond their reach, simply because the plaintiffs were not then existing creditors?

This question must be answered in the negative, *so be it*, that the wife was invested with the title for the purpose of putting it beyond their reach, the husband intending thereby to save it in her hands from the contingencies of his future busi-

Carr et al. v. Breese.

ness. It was held in *Case v. Phelps* (39 N. Y., 164) that a person about to engage in a new business could not, with a view thereto and for the purpose of securing his property for the benefit of himself and family in the event of losses occurring in such new business, convey his property to his wife, voluntarily, without consideration; that the conveyance so made would be fraudulent and void as to subsequent creditors, and that, too, although there was no intent to defraud creditors then existing. The same principle is declared in *Carpenter v. Roe* (10 N. Y., 227). So in *Savage v. Murphy* (34 id., 508) it was laid down that when a debtor transferred his real estate to his wife and children for a nominal consideration, yet continued in possession of the same, without any apparent change of ownership, *and continued in business*, paying past indebtednesses by obtaining new credit and contracting new debts until he fails in business, such transfer will be deemed fraudulent and void as to subsequent creditors; and, further, that the fact that he paid up all indebtedness existing at the time of the transfer, by means of credits obtained afterwards, did not change the legal effect of the transaction. So Judge Folger, speaking for the court, in *Shand v. Hanley* (71 N. Y., 319-322), says on this subject that "there is no difference in result, as there is no difference in intention to produce the result, between a transfer of property to defraud a creditor existing at the time, and a creditor thereafter to be made." (See, also, *Mullen v. Wilson*, 44 Penn., 413, and *Partridge v. Stokes*, 66 Barb., 586.) The principle above noted does not require for its application the entering upon a new and hazardous business by the debtor, following the transfer by him. It is the fraudulent purpose, the unfair and dishonest *intent* with which the act is done, that renders it illegal; such is the doctrine of the law; and the intent may be inferred by the probable or necessary result of the act. In many cases the fraudulent purpose becomes a necessary legal conclusion.

It is urged in this case that there was no attempted disguise as to the transfer by Breese to his wife; that the deed was immediately recorded in the proper office. On the other hand, it

Carr et al. v. Breese.

is answered that the plaintiffs knew the fact that Breese had the title when or after they began to extend credit to him; that they were never informed that it had been changed to his wife; that he occupied the property as his own, and that they relied on the supposed fact that he continued to hold the title in himself.

The referee finds that the plaintiffs had no notice or knowledge that the title to the property was put in his wife's name until after the husband's indebtedness, here sought to be enforced, accrued, and that they would not have trusted him had they known that the title was held by Mrs. Breese; and, further, that they did not give him credit after they learned that fact. We are satisfied with this finding. It seems but a reasonable and fair deduction from all the evidence in the case. The credit was continued right along without interruption, and was, at times, pretty large in amount. It is improbable that the plaintiffs would have continued so to extend credit to Breese, had they known that he had turned all or nearly all his property over into his wife's name.

It is also urged that the wife's title should be protected to her, inasmuch as the consideration of the purchase of the property conveyed to her was the sale of other real property in which she had an inchoate right of dower which she released. But the transfer to her was not made as a condition of her releasing her inchoate right of dower in the other property. That release was voluntarily made. For aught that can be seen, she surrendered her inchoate right without any condition whatever. Then the title to the property in controversy was made to her; and this was, as has been seen, fraudulent as to the creditors of her husband. But on the trial it was admitted by the defendant's counsel that they did not attempt to support the deed by any consideration for it coming from her. This may, perhaps, have been intended to apply only to an actual payment by her of a money consideration. However this may be, it does appear that the conveyance to Mrs. Breese was made to secure to her the value of her inchoate right of dower in the other real estate, which right she had released, or had agreed

Armstrong, adm'r, et al. v. Croft et als.

to release. We find no error affecting the merits in the admission or rejection of evidence. Nor do we think there is any inconsistency between the general and special findings of the referee which require notice. On the whole, we are of the opinion that the judgment directed by the referee must be affirmed.

Learned, P. J., and Boardman, J., concurred.

Judgment affirmed.

SUPREME COURT—TENNESSEE.

KNOXVILLE, SEPTEMBER TERM, 1879.

A creditor of a deceased debtor may file a bill against a fraudulent grantee of the latter to reach the property conveyed, without first obtaining a judgment on his debt or proceeding against the property of the estate.

To such a bill a plea by the fraudulent grantee, that the creditor had not brought an action on his demand within two years and six months from the qualification of the personal representative, is no defence.

A. W. ARMSTRONG, Adm'r, and SARAH E. DUNLAP v. SAMUEL CROFT and others.

COOPER, J.—The complainants file this bill as creditors of Benjamin Looney, deceased, on behalf of themselves and all other creditors of the estate, to set aside as fraudulent, certain conveyances and gifts of real and personal property, made by Looney in his lifetime to the defendants, and to subject the property conveyed to the satisfaction of their demands. The defendants filed separate pleas to so much of the bill as related to the several demands of the complainants. These pleas were, on argument, held sufficient, and upon issue joined on their truth, were found true. The bill was thereupon dismissed, and complainants have brought the case before us by writ of error.

The complainant Armstrong was, and now C. D. Berry, in his place, is administrator *de bonis non*, with the will annexed of John Cocke, deceased. According to the bill, his demand

Armstrong, adm'r, et al. v. Croft et als.

originated on the 29th of December, 1875, by the execution by Benjamin Looney of two notes under seal for four hundred and thirty-five dollars each, payable at two and three years respectively. On the 26th of January, 1866, Armstrong, as such administrator, brought suit at law on these bills single against Benjamin Looney. Pending the suit, on the 20th of March, 1868, Looney died, and in April of that year Jane Looney was appointed and qualified as administratrix of his estate. The suit, the bill alleges, was revived against her, and such proceedings were had therein that, on the 22d of October, 1869, a judgment was rendered against her as administratrix, and in favor of the plaintiff for one thousand five hundred and eighty-eight dollars and thirty-nine cents, on which execution issued and was returned *nulla bona*. The bill states that shortly thereafter Jane Looney resigned the administration of the estate, without fully administering it, and more than six months have since elapsed and no one can be found to administer the estate. The bill then sets out the gifts and conveyances of Benjamin Looney to the defendants, and alleges that they were made to hinder and delay the grantor's creditors.

To so much of the bill as relates to the demand of this complainant, the defendants file a plea, in substance, that Jane Looney resigned the administration of the estate of Benjamin Looney, and her resignation was regularly accepted on the 5th of April, 1869, before the recovery of judgment in the suit at law.

The bill treats the resignation of the administratrix as valid, and the plea is that this valid resignation was before the recovery of judgment. The argument upon the fact thus plead is, that the subsequent judgment being against a person not at the time the personal representative of Benjamin Looney, is a nullity. If the soundness of this conclusion be conceded, which may admit of grave doubt, and if it be further conceded that the facts set forth in the bill and plea show a valid resignation, which is even more doubtful, the sufficiency of the plea rests on the assumption that the bill cannot be sustained, so far as this demand is concerned, without a judgment thereon against the

Armstrong, adm'r, et al. v. Croft et als.

personal representative of the fraudulent grantor. But this is clearly an error. The defendants are only before the court as fraudulent grantees, and as against them no judgment is required to sustain the bill. Since the Act of 1852, ch. 365, brought into the Code, Section 4288, *et sequente*, any creditor, without first having recovered a judgment at law, may file a bill to set aside fraudulent conveyances and devices. And the creditors of the estate of a decedent are not required to proceed against the property of the estate before asserting their rights against a fraudulent grantee. (*Spencer v. Armstrong*, 12 Heisk., 707.) And independent of statute, it has been held, that the creditors of a deceased debtor, who have exhausted their remedy at law against the estate, although they have not obtained judgment on their claims, may file such a bill. (*Hasten v. Castner*, 29 N. J. Eq., 536; *Shurts v. Howell*, 30 N. J. Eq., 418.) The bill shows and the bill concedes, that the complainant cannot further proceed at law for want of a personal representative. The Chancellor erred in sustaining the plea, and the decree must be reversed with costs, and the cause remanded for further proceeding.

To so much of the bill as relates to the demand of the complainant, Sarah E. Dunlap, which was a claim against Benjamin Looney as surety on the bond of the complainant's guardian, the defendants pleaded that Jane Looney had been appointed and qualified as administratrix of Benjamin Looney, deceased, on the 6th of April, 1868; that the complainant was a citizen of the State at the death of Benjamin Looney, and so continued to be, her claim being due long before, and had not brought suit for more than two years and six months after the qualification of the said Jane Looney as administratrix. The bill shows on its face a resignation of the administration by Jane Looney, accepted by the county court, and the plea is fatally defective, and would be so strictly without any averment in the bill on the subject, in not averring that the administration of Jane Looney continued for at least two years and six months, or some administration for the time necessary to create the bar. And the plea, if formally good, would be insufficient for an-

Cowan v. Mann.

other reason. The statute of limitation pleaded is intended for the protection of the estates of decedents, in terms applies to actions against executors and administrators, and may be relied on by the personal representative or the heirs, when sued as to reach the property descended. Code, Secs. 2279, 2784. It has no application to an action against a fraudulent grantee in favor of such grantee.

The decree below must be reversed as to this plea also, and the cause remanded for further proceedings.

SUPREME COURT—TENNESSEE.

SEPTEMBER, 1879.

A firm executed a deed of trust for the benefit of their creditors. The wife of one of the firm had an estate consisting of real and personal property, which, by an ante-nuptial contract, was secured to her sole, separate, and exclusive use. This contract was registered in the county where the property was situated, and where the husband resided at the time it was made. Subsequently the wife sold the land, and both husband and wife removed to another county, but the ante-nuptial contract was not registered in the latter county until six months after the bill in this case was filed; this bill was to subject the proceeds of the sale of the land, and also the rest of the estate held by the wife under the ante-nuptial contract to the payment of the firm's debts, by the firm creditors, under the deed of trust for their benefit.

Held, Between husband and wife a marriage contract is good without registration; but, to protect the property from the husband's creditors, registration is necessary in the county of residence at the date of the marriage, and every county into which the husband removes with the property.

But, in a county where the contract is not registered, choses in action cannot be reached by the husband's creditors unless they have been reduced to possession by him, and are in his possession at the time the bill is filed.

COWAN v. MANN.

FREEMAN, J.—This bill is filed by the complainants as creditors of E. Mann & Co., a firm composed of E. Mann and W. T. Mann, seeking to subject certain property, both real and personal, in the county of Knox, to the payment of their debts. We do not understand the claim of the bill to be insisted on in argument here, so far as the real estate is concerned, and will not notice that aspect of the case. The real contest is, as to

Cowan v. Mann.

the claim of the wife of E. Mann, to the sum of two thousand nine hundred and forty dollars and sixty-five cents, and to a debt against the firm in favor of Wood, Marsh & Co., of Philadelphia, which has been bought by Mrs. Mann, for her *pro rata* of these debts, under a deed of trust made by the firm, to one Barnes, by which the assets of the firm were assigned to be sold, and proceeds applied, *pro rata*, to their debts, the two mentioned included.

A short statement will serve to present the facts on which the questions to be decided are raised.

In 1872 Mrs. Mann, then Mrs. Wallace, intermarried with respondent, E. Mann, in the county of Blount. She had a considerable estate, consisting of a valuable tract of land, and personal property. By an ante-nuptial contract this whole estate was secured to her sole, separate, and exclusive use, with the amplest power of control, and disposition of the same, making her in this respect equal to a *femme sole*.

This contract was duly registered in the county of Blount, where the husband then resided, and where the property was situated. Some years afterwards, however, Mrs. Mann sold the land to one Wright for the sum of ten thousand dollars, five thousand dollars of which was paid in January, 1875. The next note was paid when it fell due, leaving one note of two thousand five hundred dollars unpaid, which has been used as collateral with one of the banks of Knoxville, a defendant to this suit. Soon after this sale the parties removed to Knox County. The husband and a son engaged in mercantile business, and became insolvent in about a year, making the assignment to Barnes to which we have referred. The wife loaned the sum of money secured by the deed of assignment to the firm, taking the firm notes for it.

She also, with five hundred dollars of her money derived from the secured estate, and about two hundred dollars received as her *pro rata* from the trust, advanced to her by Barnes, the trustee, purchased the large debt of Wood, Marsh & Co., and now claims the *pro rata* shares of the assigned funds due on that.

Cowan v. Mann.

The ante-nuptial marriage contract was not registered in Knox County until about six months after the bill in this case was filed. The bill claims to have been filed under Section 4288 of the Code, authorizing a creditor, without first having obtained a judgment at law, to file a bill for himself, or on behalf of other creditors, to set aside "fraudulent conveyances of property, or other devices resorted to for the purpose of hindering and delaying creditors, and to subject the property, by sale or otherwise, to the payment of the debt." The next section authorizes the issuance of writs of attachment and injunction on filing such a bill, and prescribes the terms of the bond to be given in such cases.

In this case there is no attachment sought nor issued; an injunction is, however, and the parties inhibited from transferring or encumbering the debts sought to be reached, to wit, the surplus, if any, of the last note, and the Wood, Marsh & Co. debt, and the debt due to Mrs. Mann, and these debts are asked to be declared void, that is, the two debts, and no dividends allowed to be paid by the trustee on them, and any surplus of the note held by the bank, appropriated to payment of complainants' notes. Complainants do not, however, insist on the right to appropriate the surplus of this last note, so that the only question presented, is whether they can have the notes or debt of two thousand nine hundred and forty dollars and sixty-five cents, and the Wood, Marsh & Co. dividend, indirectly appropriated to their benefit, by declaring the debt as due to the husband, and that nothing shall be paid on them to the wife.

The principles of law on the subject of ante-nuptial marriage contracts in our State, in the aspect as now presented, are well settled. Before our Registry Act of 1831, it had been settled that registration was only necessary to protect against the creditors of the grantor, under the Act of 1785. Since the Act of 1831, however, it is equally well settled that registration is required, in accord with that Act and Code, Secs. 20-25, in order to protect property secured to the wife by a marriage contract from the creditors of the husband. That section provides that marriage contracts, in which the wife's property be-

Cowan v. Mann.

fore marriage is settled on her, or a trustee for her use, shall be registered in the county where the husband resides at the time of the marriage, and in every county in the State to which he may remove with the property; and if made out of the State, it is to be registered in every county in the State to which they may remove with the property.

With these principles settled, it follows that while the marriage contract was perfectly good, as between the husband and wife, it interposed no obstacle to a creditor of the husband, in enforcing by due process of law a claim against the husband, or against the property embraced in it, for want of registration in the county of Knox, to which he had removed with the property, other things being out of the way.

We have, then, the case of a husband, with the proceeds of the real estate of his wife in her hands, which property itself before conversion was not or would not have been protected in the county of Knox, had it been there located by the marriage contract, for want of registration in that county. It would, however, have stood as any other real estate, and been protected by the Act of 1849, 1850 (Code, Sec. 2481), from the husband's debts, which statute exempts the interest of the husband in the real estate of his wife, acquired by her either before or after marriage, in any mode whatever. When the wife sold the real estate, and converted it into money and choses in action, as she had the right to do, it then stood as any other personalty in her hands, as wife, so far as the husband's creditors were concerned in the county of Knox, being unprotected by the marriage contract, for want of registration, as between them (that is, husband and wife), it was protected by it, the contract only being void as to creditors. The choses in action being in the name of the wife, proceeds of her property secured by the marriage contract, would not be subject to his debts, because not reduced to possession, the right of the wife still existing till then, so that if she survived him, the marital right could not fix on them, and she would be entitled to these notes. (3 Sneed, 540. See Wait's Actions and Def., vol. 3, 639, 640, and authorities there cited.)

Cowan v. Mann.

If chattels had been received for the land, or purchased with its proceeds, the possession of the wife would have been the possession of the husband, and as against a creditor in Knox County, the marriage contract would have interposed no barrier to their appropriation, under process of law, to the husband's debts. So when the money was received by the wife, nothing else appearing, if legal process had been fastened on that, while in the possession of the wife, or a lien fixed, the same result would have followed. The possession of money by the wife, is the possession of the husband. (*Hudiberg v. Yost*, *MS.*, present term.) But in this case, before any such process has been fastened on this money, or lien fixed on it, the money was loaned by the wife to the firm of Mann and Co., and the chose in action due from that firm is in the possession of and given to the wife, and that is what is sought to be reached in the case of the debt due from the firm to her for loaned money. We cannot see how the creditor stands in any higher position as to this, than he does as to the notes given for the land or any other chose in action, the proceeds of which are not reduced to his possession during the coverture. The fallacy of the complainant's argument rests in the assumption that in the case of property covered by an unregistered marriage contract, in possession of husband and wife, when it is open to legal process, and liable to it at any time, that the right remains, even after the possession of the husband is gone. In other words, that this money became absolutely the husband's property by virtue of the marital right. This is not true. If this theory were correct, and the creditor's right is fixed on the property because it might have been subjected, then the subsequent registration of the instrument would fail to protect it as to debts contracted by the husband before registration, though such debts were simply contracts, giving no lien on the property. Such a conclusion would hardly be maintained by complainant's counsel. The money, or a chattel, might, as such, have been subjected to his debts, because of want of registration of the marriage contract, but the right was only in him as against it. As soon as its form is changed, so that it

Cowan v. Mann.

ceased to be thus in the possession of the husband by virtue of his marital right, the creditor's right ceases. It did not vest as personalty absolutely in the husband as between him and his wife, because of the contract valid as between them. It was only unprotected from legal process by a creditor, by the provisions of the Act of 1831, and section of the Code embodying that act. It follows that having failed to fasten on the money while in possession of the wife, when that money has been disposed of, and become a debt due to the wife, it is freed from such liability and stands as her chose in action until the money should again come to her hands. A creditor certainly has not the right to enforce the collection of a chose in action due the wife, in order that the proceeds may be reduced to possession, vest in the husband, and so be subject to his debt. This is practically what is sought to be done in this case.

The same principle applies to the debt of Wood, Marsh & Co., purchased by her with money received from her separate estate and dividends. This is a chose in action due the wife, of which the husband was not possessed at the time of filing this bill, and which cannot be reached, directly or indirectly, in that form in this proceeding. The registration of the marriage contract since the bill was filed, as a matter of course will protect the money when it shall be paid her, as it will be reduced to possession after that registration. We would reach the same result under the principle of the case of *Embry & Young v. Robinson and wife*, 7 Hum., 444, Coop. Ed., and other cases, that a conveyance by a husband of property to a trustee for the benefit of the wife, before liens have attached, in consideration of her money received and applied to payment of his debts, which money was only receivable by him by assent of the wife, is based on a valuable consideration and will be upheld. In fact the case is one so nearly identical in its circumstances to the one now before us, as that we might well have rested the entire conclusion on the principle thus settled.

The result is, that the chancellor's decree dismissing the bill must be affirmed with costs.

In the matter of Bailey, Assignee of Burdick.

COURT OF COMMON PLEAS—NEW YORK.

GENERAL TERM, APRIL, 1880.

A creditor whose name appears on the schedule, but who has failed to present proof of his claim is not entitled to a share in the insolvent's estate. Reversing In matter of Bailey, Assignee of Burdick, Van Hoesen, J., New York Common Pleas, Special Term, Feb., 1880; and overruling Daly, J. In matter of Oakley, 1 Ins. R., 56.

In the matter of BAILEY, Assignee of BURDICK.

AN application was made at Special Term to confirm a referee's report. The claim of a creditor which appeared on the schedule had not been presented or proved. The question was whether any allowance should be made on such claim on final accounting by the assignee.

Thomas C. Campbell, for the assignee.

G. N. Campbell, for the assignor.

William Lindsay, for J. C. Cameron & Co., creditors.

The following is the opinion of the Special Term.

VAN HOESSEN, J.—I feel bound to follow the decision of Judge J. F. Daly in the Oakley case, though I cannot say that I should take the view of the question which he adopted if the matter were *res integra*. It is proper that this case should go before the General Term, for the question is an important one, and I follow Judge Daly's ruling, though not satisfied with it.

It does not appear whether the creditor represented by Mr. Metzger had notice of the hearing before the referee. If a summons with the underwriting were served upon the creditor, or upon the attorney, and he did not appear, he would not be entitled to further notice of the proceedings, unless he asked to be notified of the filing of the referee's report. If he filed no claim, verified or unverified, I should be inclined to hold, if Judge Daly's decision were not to the contrary, that he should

In the matter of Bailey, Assignee of Burdick.

not be admitted to a share of the estate, as the matter stands. I must decline to confirm the referee's report, but I must order the assignee to pay all creditors whose names appear on the schedules, whether they have presented claims or not.

On appeal to the General Term this order was reversed in the following opinion :

Wm. Lindsay, for the appellants.

G. N. Campbell, for the assignee.

LARREMORE, J.—This is an appeal from an order on a final accounting directing the distribution of the trust fund among all the creditors named in the schedules of the insolvents, irrespective of any proof of the claims mentioned in such schedules.

The learned judge from whose order this appeal is taken has intimated an acquiescence in the view contended for by the appellants (*In re John D. Weinholz*, July 25, 1878). But, while reiterating the same opinion in his decision of this application, he felt constrained to follow the ruling in the matter of the accounting of Oakley, assignee (S. 2, vol. I. of American Insolvency Reports), and granted the order which is the subject of this appeal. The question thereby presented is whether a creditor, named as such in the schedules, is entitled to a distributive share of the trust funds without making presentation or proof of his claim.

Prior to the Act of April 13, 1860 (Laws of 1860, Chapter 348), the only mode of passing the account of an assignee of a trust fund was by a suit in equity in behalf of the party plaintiff and all interested in the assignment who should, after due notice, come in and claim the benefit thereof, by proving their claims (*Kerr v. Blodgett*, 48 N. Y., 62).

The act above mentioned was intended as a summary remedy to accomplish the same object, and the various amendments made thereto have all had for their purpose the abridging of the practice without impairing the spirit and intention of the law relating to special trusts.

In the matter of Bailey, Assignee of Burdick.

A cardinal principle thereof is the good faith of each transaction subjected to review; and to this end all the safeguards of inspection, examination, and legal adjudication have been made applicable to test the validity and honesty of the proceedings.

Collusion on the part of the assignor, or his creditors, or of any party interested has always been open to legal investigation. The Legislature on June 16, 1877, passed an "Act in relation to Assignments of the Estates of Debtors for the Benefit of Creditors." (Laws 1877, Chap. 466), which repeals all former acts upon the subject. Section 4 of this act authorizes the assignee to advertise for creditors to present to him their claims, with vouchers therefore duly verified. Section 13 provides that a citation for an accounting to all parties who are interested in the fund must be served; except that if the time limited by the advertisement for presentation of claims has expired before the issue of the citation, creditors who have not duly presented their claims need not be served.

The referee found in favor of the creditors who had presented their claims, and who appeared upon the accounting. This ruling was in conformity with the statute, which does not authorize indiscriminate distribution to all persons named as creditors in the schedules. To hold otherwise would be to allow the assignor to pass upon the validity of all claims not presented or proved. The naming of a creditor in the schedule is not a presentation or proof of his claim within the meaning and intent of the statute. An assignor might name in his schedule a creditor for a fictitious debt. The creditor makes no presentation or proof of his claim, thus escaping the scrutiny and examination of the other creditors, and also the necessity of substantiating his demand by his oath. It is obvious that if no distinction were made between such a claim and claims duly presented and proved, a wide door would be opened to fraud and collusion, and an act that was passed for the benefit of creditors perverted.

The assignee is liable on his bond for twenty years unless legally discharged. It is a grave question whether an order

Anthony et al. v. Stype.

for his discharge would protect him in the payment of a claim which was fraudulent, and which the creditors had no opportunity to object to or dispute. If any person has a claim against the trust fund, he should present and prove the same and invite an investigation as to its validity. Creditors who have fulfilled these requirements are the only ones entitled to share in the distribution of the fund.

The order appealed from should be reversed, with costs.

DALY, C. J., concurs ; J. F. DALY, J., dissents.

SUPREME COURT—NEW YORK.

NOVEMBER GENERAL TERM, 1879.—THIRD DEPARTMENT.

The law allows a debtor to assign his property to pay his debts, and even to make preferences, but compels him to make his selection without any conditions for personal gain to himself ; thus he cannot by an assignment hold out a hope of an extra share of his assets or a fear of loss of any participation therein, as a means to induce a creditor to abandon all or any part of his claim, or to forbear pursuing his legal remedies therefor. (*Gasherie v. Apple*, 14 Abb., 64, followed.)

ANTHONY et al. v. JAMES STYPE.

THE opinion presents the facts.

BOCKES, J.—This is an appeal from the order of the Special Term, denying a motion to set aside an attachment.

The warrant of attachment was granted under and pursuant to Section 636, of the code of civil procedure, on the ground that the defendant was about to assign or dispose of his property with intent to defraud his creditors. The motion to discharge the warrant of attachment was made on the papers used in obtaining it ; and was based on the insufficiency of those papers alone.

It was made to appear from those papers that the defendant was justly indebted to the plaintiff on contract for goods, wares, and merchandise sold and delivered, in the sum of

Anthony et al. v. Stype.

two hundred and seventy-five dollars and fourteen cents, besides interest; that the defendant had been and still was a merchant, doing business at Gouverneur, N. Y.; that he had become and was insolvent; that the plaintiffs (through agents) called on the defendant for payment; that he admitted his inability to meet his engagements and to pay his debts in full; that he was willing to turn out his goods to his creditors, if they would get together and agree to take and apply them *pro rata* on their claims, and discharge him from further liability; that he asserted that if sued he would make an assignment with preferences, and would leave out those suing, so that they should get nothing on their claims; that notwithstanding his admitted insolvency, he kept his store open, continued to dispose of his goods, and appropriate the avails of sales to other purposes than to the payment of his debts, refusing to pay anything, either in goods or money, to his creditors, and declaring that he would not pay anything, unless his creditors all agreed to take his goods and apply them *pro rata*, and discharge him; that a large number of his creditors refused these terms, but so far as was known they were willing to take the goods and apply them on his indebtedness, but this he refused, and continued to dispose of them, and that he deterred his creditors from suing him on penalty of losing their claims.

It seems to me that here is abundant proof of an intent to make a fraudulent disposition of his property. Indeed, his disposition of his property daily, appropriating the avails of sales otherwise than to the payment of his debts, was a fraud upon his creditors. He was irrevocably insolvent; yet he continued to dispose of his property, refusing to apply the avails to the use of his creditors, and threatening them with the entire loss of their claims in case they should exercise their legal right to obtain their pay. Being insolvent, his creditors had a right to the immediate application of his property in satisfaction of their claims. He refused this application, except as it was to be accompanied with unconscionable terms, and threatened an unequal distribution, to be based on an unfair discrimination. A creditor had a right to sue him, and should he do so, it would

Anthony et al. v. Stype.

give no just or honest cause for placing him where he would lose his entire claim.

It has been held that it was no evidence of fraud for an insolvent debtor to threaten an assignment, for this would but imply an equal distribution among his creditors; and equality is equity. (*Dickerson v. Burnham*, 20 How., 343.) So, too, it has been held that a threat to give preference might not be evidence of a fraudulent intent, because in some cases this would be just and equitable. But such a threat gives suspicion of fraudulent purpose, and would, with slight circumstances tending in the same direction, uphold a presumption of fraudulent intent. It was held in *Gasherie v. Apple* (14 Abb., 64), that a debtor cannot use the power he has of assigning his property preferentially to intimidate creditors into abstaining from pursuing the remedies allowed by law to collect debts without being chargeable with intent to defraud them. In this case *Wilson v. Britton* (26 Barb., 562) is, I think, properly commented on. In *Livermore v. Rhoades* (27 How., 506) the debtor made threats similar to those made in this case. The court remarked that the threats evinced an intention to dispose of property so as to baffle the creditors in the speedy collection of their debts, which, of course, could only be done by illegal means. I commend the following remarks in *Gasherie v. Apple* (*supra*), as sound; to wit: "The law allows a debtor to assign his property to pay his debts, and even to make preferences, but compels him to make his selections without any conditions for personal gain to himself; thus he cannot by an assignment hold out a hope of an extra share of his assets, or a fear of loss of any participation therein, as a means to induce a creditor to abandon all or any part of his claim, or to forbear pursuing his legal remedies therefor." Now, what would be fraudulent in this regard in an assignment, would be fraudulent out of it. But this case is much stronger than any cited in the books. Here it is made to appear that the defendant employed the threats stated to prevent legal action by his creditors, while he could make disposition of his goods fraudulently from day to day; for it is shown that he continued to make sales of goods,

Pillsbury, Assignee of Doremus, v. Kingon.

appropriating the avails to some purpose other than to the payment of his debts, refusing their payment at all, either in goods or in money. Here was the fraudulent act itself, continued from day to day, affording absolutely conclusive evidence of the fraudulent intent charged.

The order appealed from should be affirmed, with ten dollars costs of appeal and expenses for disbursements.

BOARDMAN, J., concurs.

COURT OF CHANCERY—NEW JERSEY.

OCTOBER TERM, 1879.

An assignee under an assignment for the benefit of creditors, cannot, unless they were a fraud upon his assignor, maintain an action to invalidate transfers made by the latter in fraud of creditors.

NEHEMIAH O. PILLSBURY, Assignee of JOHN C. DOREMUS, v. JAMES KINGON.

F. Adams, for complainant.

J. H. Ackerman, for demurrant.

THIS action was brought by Pillsbury, assignee, to invalidate a conveyance made by Doremus, assignor, on the ground that it was made in fraud of creditors.

The bill was demurred to.

VAN VLEET, Vice-Chancellor.—The demurrer in this case disputes the right or capacity of the complainant to maintain this suit. He is an assignee under the act regulating assignments by debtors for the benefit of their creditors, and, as such, seeks to invalidate a deed made by his assignor, just prior to the assignment, on the ground that the deed was made for the purpose of defrauding creditors. The bill exhibits a strong case of actual fraud, and, if the complainant has a right to avoid the acts of his assignor, there can be no doubt about

Pillsbury, Assignee of Doremus, v. Kingon.

his right to relief on the case made by the bill.⁴ The demurrer presents other objections to the complainant's right to recover than his incompetency to sue, but, in my judgment, they do not possess even the merit of plausibility.

The important question is, Whom does the assignee under a voluntary assignment represent—simply the assignor? or, does he also stand in the right of his creditors, and represent both? If he represents only the assignor, it is clear he cannot be heard to impeach the assignor's acts, for no man can invest another with a power he does not himself possess (the creature can never be greater than his creator), and no man can be permitted to found a claim on his own iniquity; *nemo ex proprio dolo consequitur actionem*. A fraudulent conveyance is good against the parties and their representatives. A fraudulent vendee may even recover the subject of the transfer from the administrator or executor of the fraudulent vendor. (*Hawes v. Leader*, Cro. Jac., 270; *Osborne v. Moss*, 7 Johns., 163; 1 *Am. Lead. Cas.*, 43.) The power to make an assignment for the benefit of creditors is not derived from any statutory enactment. Every debtor, whether solvent or insolvent, possesses, independent of statutory grant, the right to make any disposition of his property which does not interfere with the rights of others; in other words, to make any honest disposition of his property that he pleases. The right of assignment is clearly within the absolute dominion which the law empowers every man to exercise over his own. Our statute does not confer the right, but was made to regulate its exercise. The debtor in this case, in making an assignment, simply exercised a common law right; but he was bound to exercise it subject to the restrictions and limitations imposed by the statute for the accomplishment of certain wise and just purposes. But it was his voluntary act, and not the act of the law. It was an act to which he could not legally be coerced.

Undoubtedly, where a person holding a representative position, comes to title, not under the debtor, but by right paramount to any he possesses, so that his investiture is the act of the law, as is the case with an assignee in bankruptcy, or under

Pillsbury, Assignee of Doremus, v. Kingon.

the insolvent law, and receivers of a certain class, he is something entirely different from an instrument or appointee created simply by the voluntary act of a debtor. He is the creation of the law for the protection of creditors, and may, therefore, very properly exercise their powers and attributes. (1 *Am. Lead. Cas.*, 42; *Miller v. Mackenzie*, 2 Stew., 291.)

This question has been the subject of considerable diversity of opinion. Justice Potts, in *Garretson v. Brown* (2 Dutch., 438) stated, that an assignee under a voluntary assignment, not only had the power to avoid a fraudulent disposition previously made by his assignor, but, if he neglected his duty in this respect, creditors could compel him to perform it. This remark was not pertinent to any issue brought under judgment in that case, and was probably uttered without much examination of the authorities, possibly without any.

Chancellor Zabriskie, in *Van Keuren v. McLaughlin* (6 C. E. Gr., 163) gave expression to the opposite view. He held that a conveyance of real estate, made in fraud of creditors, prior to the date of the assignment, though void against them, is valid against the assignee. He rests his judgment distinctly upon the ground that, inasmuch as the assignor cannot found a claim upon his own fraud, he is powerless to confer authority upon any one else to do so.

Chancellor Kent, in *Bayard v. Hoffman* (4 Johns. Ch., 450), held that an assignee had a right to impeach fraudulent transfers made by his assignor, but, contrary to his usual habit, he did not attempt to attest the correctness of his conclusion by either citing precedents, or giving reasons. When the same question was subsequently presented to Chancellor Walworth for solution, he said: "It is a general rule of law that a person cannot, by any voluntary act of his own, transfer to another a right which he does not himself possess. And where an insolvent debtor has made a fraudulent transfer of his property for the purpose of defrauding his creditors, so that he cannot reclaim it himself, I think he cannot, by an assignment which is wholly voluntary on his part, transfer that right to his assignee for the benefit of preferred creditors or for the

Pillsbury, Assignee of Doremus, v. Kingon.

benefit of all his creditors equally." (*Brownell v. Curtis*, 10 Paige, 210.) This ruling was followed in *Storm v. Davenport* (1 Sandf. Ch., 135.) By a statute passed in 1858, the New York Legislature expressly invested assignees with this power. (Burr on Assignment, 545.) The course of judicial opinion in Pennsylvania has been quite as diversified. *Thompson v. Dougherty* (12 Serg. & R., 448) held that the assignee simply stood in the shoes of his assignor, and was incompetent to undo what his assignor had done, while, in the subsequent cases of *Englebert v. Blanjot* (2 Whart., 240), and *Irwin v. Keen* (3 Whart., 347), the opposite doctrine was laid down, with evident surprise that any other view had ever been expressed from the bench. And then followed *Vandyke v. Christ* (7 Watts & Serg., 374), in which Chief Justice Gibson, apparently unmindful of the fact that he had drawn up the opinion of the court in the two previous cases, said: "The assignee is the debtor's instrument for distribution, and stands in relation to the property as stood the debtor himself. It has been transferred to him as it would have been transferred to the debtor's right hand, had it pleased him to exercise his common law right. As he stands in no privity to the creditors, he cannot arrogate to himself any of their attributes and rights."

If a debtor of this State, in making an assignment, simply exercises his common law right, and our statute confers upon his assignee no power or rights in addition to those he derives from his assignor, it would seem to be quite plain, both as a matter of reason and principle, that the assignee, being the mere creature of the assignor, can do nothing more than his creator could do. The statute makes no express grant of creditor's rights or powers to him, nor do I think it is possible to read the statute so as to be able to say that such grant exists by necessary implication. By the thirteenth section, it is declared that every assignee shall have as full power and authority to dispose of all estates assigned, as the debtor had at the time of the assignment, and to sue for and recover, in his own name, everything belonging or appertaining to the estate of the debtor, and to do whatsoever the debtor might have lawfully

Pillsbury, Assignee of Doremus, v. Kingon.

done in the premises (Rev., p. 39). The assignee's power of disposition, it will be observed, is limited to that which might have been exercised by the debtor himself; his right of action is restricted to the recovery of the "debtor's estate," such, obviously, as the debtor might himself, but for the assignment, have recovered by suit; and when, as the conclusion of the whole matter, general powers are conferred, they are limited to such as the debtor himself might have *lawfully* exercised.

That part of the statute which defines the rights of creditors who exhibit their claims, and also of those who do not, and likewise prescribes how far the debtor shall be discharged, affords, I think, an important clue to the legislative design. It is enacted that creditors who exhibit their demands for a dividend shall be wholly barred from having afterward any action against the debtor, unless, on the trial, they shall prove fraud in the debtor in making the assignment, or in concealing his estate, whether in possession, held in trust, or otherwise, but creditors who do not exhibit their claim shall not be barred of their right against either the person of the debtor, *or any of his estate not assigned* (Rev., p. 40). Now, it seems to me, if it had been the legislative purpose to invest the assignee with capacity to invalidate the debtor's fraudulent acts, it would not have been thought necessary to reserve the same right to creditors who had exhibited their claims. Indeed, the existence of such right in their hands would be inconsistent with the main purpose of the statute. The main design of the statute is to secure equality in distribution. If the assignee has this right, he holds it for the benefit of all creditors, or, at least, for all who have exhibited their demands. If we say the statute also gives the same right to any creditor who may chose to exercise it, and that each may exercise it for his own exclusive advantage, we engraft upon the statute, in the absence of any expression to warrant it, a meaning plainly in conflict with its fundamental purpose. But, again, it will be observed, that creditors who do not exhibit their claims, retain their rights against not only the person of the debtor, but against "any of his estate not assigned." What estate is here referred to?

Pillsbury, Assignee of Doremus, v. Kingon.

Certainly not property acquired subsequent to the assignment. If that had been meant, terms much more apt, as words of description, would have readily suggested themselves to the minds of the legislators. Besides, in preserving the rights of creditors against the debtor's person, his subsequently-acquired property was made amenable to the payment of such debts. The estate, or property intended to be described, was such, I think, as the debtor could not claim or recover, but such as his creditors might.

But a more decisive consideration must be mentioned. If we adopt the complainant's construction, we are compelled to declare that this statute abrogates an established doctrine of the law, so far, at least, as it applies to a special class of cases. It is a settled legal rule, that a transfer of property, made in fraud of creditors, while void as to them, is good between the parties and their representatives. A solvent debtor may make an assignment. If a surplus remains after the assignor's debts are paid, and the fees and costs of administration are discharged, the assignor is entitled to it. That the surplus shall be paid to him is usually one of the trusts expressed in the deed. If an assignee has the power claimed for him, did the Legislature mean that he should exercise it for the benefit of his assignor? Such a purpose must not be attributed to them except upon very clear evidence. If they did not mean this, how is the assignee's power to be exercised for the benefit of creditors alone, and so that the debtor derives no advantage from it? This case presents a striking example of the difficulties that may result from the adoption of the complainant's construction. It is estimated that two thousand seven hundred dollars will be realized from the estate assigned; the debts exhibited to the assignee amount to four thousand four hundred dollars; the value of the lands alleged to have been fraudulently conveyed, is estimated at seven thousand dollars. So that, if the complainant should be successful in his suit, and should realize the full value of the property, he will have in hand a surplus of over five thousand dollars. What would he do with it? By the terms of his trust he is bound to pay it to assignor, and yet, as between

Pillsbury, Assignee of Doremus, v. Kingon.

his assignor and his assignor's grantee, his assignor is precluded, by his own turpitude, from asserting any claim to it. These considerations, as well as the precedent cited, render it quite clear, I think, that the complainant cannot, either in virtue of his office, or by force of his title, maintain this suit.

On the argument, *Matlack v. James* (2 Beas., 126) was cited as tending somewhat to support complainant's view. The material facts of that case were: Two of four partners, just prior to an assignment by the firm, conveyed their interest in certain real estate, standing in the names of the individual members of the firm (but which had been purchased with the funds of the firm, and been used for partnership purposes, and constituted part of its capital), in payment of their individual debts. The grantee took, with notice, that the land constituted part of the partnership property. Chancellor Green, on a bill by the assignee, adjudged the deed to be void. He does not state the grounds of his judgment, but I think they are apparent. Real estate purchased with partnership funds, and used for partnership purposes, though title be taken in the names of the individual copartners, is, in equity, considered partnership assets, so far, at least, as may be necessary to pay the partnership debts, and adjust the equities between the partners. (*Baldwin v. Johnson*, Sax., 441; *Dyer v. Clark*, 5 Metc., 562; Story on Partn., Section 93.) The deed was therefore a fraud on the partnership. It was an attempt, by two of the partners, to divert partnership assets from partnership uses and purposes, and appropriate it to their own use. Upon these facts, it was clearly competent for the assignee, as the representative of the defrauded partners, and in virtue of rights he derived from them, to attack this deed. If no creditor's interest had been involved, he could still have maintained his action. The defrauded copartners had a right to redress against the fraud, and so had their representative. The adjudication in the case referred to stands on a principle entirely aside from that involved in the discussion, and that case cannot be used as a precedent in this.

The demurrer must be sustained, and the complainant's bill dismissed, with costs.

In re Risley v. Smith, Assignee, etc.

COURT OF COMMON PLEAS—NEW YORK.

SPECIAL TERM.—JANUARY, 1880.

Where an assignment makes no provision for the indemnification of persons who, subsequently to the assignment, incur liabilities, or make advances for the assignor, their claims should not be allowed.

What allowances and costs will be allowed where a trial of a disputed claim is had.

In the matter of LAWRENCE G. RISLEY v. SMITH,
Assignee of RISLEY & BURRIS.

THIS was an application to confirm a referee's report. Risley, who was surety for the assignors on a lease, paid two months' rent accruing subsequently to the assignment, and a bonus to the landlord to be released from his further liability. He sought to make the sums so paid a claim against the insolvent's estate. His claim was rejected by the assignee, and disallowed by the referee.

Samuel Brown, for assignee.

John E. Risley, for claimant.

VAN HOESSEN, J.—It is not contended that the assignment provides for the payment or indemnification of persons who, subsequently to the date of the assignment, incur liabilities, or make advances for the assignor; there is, therefore, no authority for the payment by the assignee of those claims which Risley presents for advances or payments made by him after the assignment was executed. (Burrill on Assignments, Marg. p. 76, and notes.)

For this reason alone, the report of the referee should be confirmed. But, after reading the testimony, I am of opinion that the bonus paid for the cancellation of the lease, and the payment made for the rent for the quarter ending August 1, 1879, could not be allowed, even if the assignment had expressly provided for the indemnification of those who, after the execution of the assignment, should discharge liabilities

In re Risley v. Smith, Assignee, etc.

arising out of suretyships undertaken for the benefit of the assignor, prior to the assignment. The bonus could not become a claim against the assignor without his consent, and, of course, was not a valid claim against the estate in the hands of the assignee. It was, in every respect, an unnecessary expenditure, and it proved, in this case, to be a most foolish one. So, also, with respect to the payment of the August rent.

The lease was surrendered and cancelled in July. Rent paid for the quarter ending in August following, constituted no legal claim, and it was paid, doubtless, for the benefit of the new firm, which was then in the occupation of the demised premises. It cannot be allowed against the firm of Risley & Burris, or against their creditors. Were it not that the claim for the rent paid for the quarter ending May 1st is a claim for a payment made after the execution of the assignment, I should be inclined to allow it.

The report of the referee is confirmed, and the exceptions are overruled. The claimant must pay as costs the referee's fees, and the necessary disbursements of the assignee at the trial.

I do not feel at liberty to award more than the usual five per cent. on the amount of the claimant's demand as counsel fee to the prevailing party. It is true that Section 26 of the Assignment Act does not by its terms limit the amount of counsel fees to be awarded where a trial is had of a disputed claim, but I see no reason why allowances for a trial under that act should exceed allowances for trials under the code of procedure. The assignee is entitled to charge reasonable fees paid to his attorneys and his counsel as part of the expenses of administering the estate; an allowance to be paid by the losing party ought not to exceed the statutory rate for analagous proceedings. In addition to the five per cent., I think it not improper to allow costs of proceedings before and after notice of trial, and the usual trial fee of an issue of fact. The latter are taxable as costs. (5 Abb. N. C., p. 144.)

Klauber, Assignee, v. Charlton.

SUPREME COURT—WISCONSIN.

NOVEMBER, 1879.

The certificate made by the proper officer, although *ex parte*, of the qualifications and pecuniary responsibility of the sureties on an assignee's bond, is conclusive upon all parties interested in every collateral action, unless it be shown by the creditors attacking the assignment that it was made for the purpose of hindering, delaying or defrauding the creditors of the assignor within the meaning of the statute.

Evidence offered in a collateral action solely for the purpose of showing that the assignment was void for non-compliance with the statute, properly excluded. To avoid an assignment for non-compliance with the statute, an action must be brought for that special purpose, in which all the parties interested can be heard.

ISAAC KLAUBER, Assignee of BERNARD KOHNER, Respondent, v. WILLIAM CHARLTON, Appellant.

THIS was an appeal from the Circuit Court of Dane County. The facts are fully stated in the opinion.

H. M. & H. A. Lewis & Sloan, Stevens & Morris, for respondent.

Vilas & Bryant, for appellant.

TAYLOR, J.—This is an action of replevin. The plaintiff claims the property as assignee of Bernard Kohner by virtue of an assignment made under the provisions of Chap. 63, R. S. 1858, as amended by Chap. 64, L. 1858. The defendant, as sheriff of Dane County, claims the goods by virtue of a levy thereon made by him upon two executions issued out of the Circuit Court of said county upon two judgments rendered in favor of the plaintiff in two separate actions against said Bernard Kohner. The assignment was executed and delivered, and the assignee took possession of the goods before the executions were levied. The sheriff having taken possession of the goods by virtue of his levy, the assignee brought this action of replevin to recover the possession thereof.

This case has been in this court before upon an appeal by

Klauber, Assignee, v. Charlton.

the present defendant and upon that appeal this court held that the bond given by the assignee was sufficient in form and the assignment was not void on account of any insufficiency in the form of the bond itself. (See *Klauber v. Charlton*, 45 Wis., 600.)

Upon a re-trial of the case the plaintiff had judgment in the court below and the defendant appeals and alleges as error, that the court below excluded evidence offered on his part for the purpose of showing that Thuringer, one of the sureties on the bond of the assignee, was not "a freeholder of this State.

The evidence on the part of the plaintiff showed that a bond sufficient in form as this court held upon the former appeal had been given by the respondent upon the assignment of the property to him, that Thuringer and Samuel Klauber, the sureties to such bond had each made the following affidavit:

"STATE OF WISCONSIN }
COUNTY OF DANE, } ss.

(Name of surety) one of the sureties of the foregoing bond, being duly sworn says, that he is a resident and freeholder within this State, and that he is worth the sum of . . . thousand dollars, over and above all his debts and liabilities, and exclusive of property exempt by law from execution in property situate in said State of Wisconsin."

(Signed by surety.)

Subscribed and sworn to before me this }
4th day of February, A.D. 1878. }

ALDEN S. SANBORN,

County Judge, Dane County, Wis.

On the back of the bond was the following indorsement:

"I hereby approve of the written bond and of the sufficiency of the sureties therein."

Dated February 4th, 1878.

ALDEN S. SANBORN,

County Judge, of Dane Co. Wis.

Klauber, Assignee, v. Charlton.

Thuringer justified in the sum of five thousand dollars, and Klauber in the sum of fifteen thousand dollars.

The only question arising upon this appeal is, whether it was competent for the defendant to show that one or both of the sureties were not in fact freeholders within this State at the time of signing the bond, for the purpose of evading the assignment under the statute.

The statute above cited declares that the assignment shall be void as to the creditors of the assignee, unless, amongst other things, a bond shall be given "in such sum not less than the whole amount of the nominal value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses and of the assignor, with two or more sufficient sureties, freeholders of this State, who shall each testify as to his responsibility, and by their several affidavits satisfy the officer taking such bond that the property of such sureties being within this State is worth in the aggregate the sum specified therein."

Previous to the enactment of this statute, it was competent for a debtor to make an assignment of his property to any person of his choice for the benefit of his creditors, without requiring such assignee to give any security for the faithful performance of the trust reposed in him, and his creditors would be bound by such assignment, in the absence of fraud. The fitness or unfitness of the assignee to discharge the trust, could not be inquired into in a collateral action by a creditor, except for the purpose of showing the fraudulent intent of the assignor in making the assignment. (Bump on Fraudulent Conveyances, 367, 368; Burrill on Assignments, Section 92; *Angell v. Rosenburg*, 12 Mich., 241, 255, 256; *Guirier v. Hunt*, 5 Minn., 375; *Cram v. Mitchell*, 1 Sandf. Ch., 251; *Currie v. Hart*, 2 Sandf. Ch., 353.)

The statute above cited was passed for the purpose of compelling assignees to give security for the faithful performance of their duties as such, and thereby afford some assurance to the creditors that the property assigned would be faithfully administered for their benefit, and declared all assignments

Klauber, Assignee, v. Charlton.

absolutely void which were not made to some resident of this State, and where the assignee did not give the bond required by such act. The statute provides that the amount of the penalty of the bond shall be fixed by the oath of two witnesses and that of the assignor, swearing to the nominal value of the assets and that the sureties to the bond shall testify as to their responsibility, and by their several affidavits satisfy the officer taking the bond that the property of such sureties, being within this State, is worth in the aggregate the penalty of the bond. It will be observed that the whole proceeding is *ex parte* in its nature, as no notice is required to be given to any person interested; but the method of doing the same is particularly prescribed by the statute, so far as the penalty of the bond and the sufficiency of the sureties are concerned, and the statute having provided no method of reviewing these proceedings, they are when made as the statute directs, conclusive upon all parties interested unless impeached for fraud.

This court has substantially held in the case of *Hutchinson v. Brown* (33 Wis., 465), that the statutory method of fixing the penalty of the bond must be followed, and that when it is so fixed, it cannot be impeached in a collateral action, because it was not, in fact, given for either the real or nominal value of the assets. The method prescribed by statute having been, in fact, substantially complied with, it must stand until set aside for fraud or other sufficient cause, in an action brought for that especial purpose, in which all parties having an interest can be heard; and in the case of *Churchill v. Whipple* (41 Wis., 611), it is expressly held that the pecuniary ability of the sureties must be ascertained in the way pointed out by the statute, and cannot be ascertained in any other way. It was held that because the affidavit of the sureties did not show that they were worth the required amount in property within this State, the bond was void, and that it could not be validated by showing that fact in any way or manner, other than by their affidavits made before or delivered to the officer at the time of his reception of the bond. Justice Lyon, who delivered the opinion in that case says: "Notwithstanding the very ingenious argument

Klauber, Assignee, v. Charlton.

of the learned counsel for the plaintiff in support of the opposite view, it seems very clear to our minds that the statute requires such fact to be shown by the affidavits of the sureties, and that in no other way can it be made to appear that they have the requisite property in this State. The plain meaning of the statute is, that the assignment shall be void unless the sureties shall satisfy the officer taking the bond that they have the requisite property in this State, and that this can only be done by the affidavits of the sureties themselves."

Like the preliminary affidavit which the statute requires to be made before an attachment against the property of a debtor shall issue, it must conform to the requirements of the statute, and unless it so conforms the attachment is void, and no amount of other evidence of the fact required to be stated in such affidavit can be substituted therefor. And when the affidavit conforms to the statutory requirements, no amount of testimony can impeach it, unless the statute provides that it may be impeached, and points out the manner of impeaching the same.

The only question, therefore, under the decisions of this court, is whether it was the duty of the officer by whom the bond was taken, to inquire as to the qualification of the sureties, as well as to their pecuniary responsibility. The only qualification of the sureties, other than that they have the the necessary property in this State, is that they shall be freeholders of this State.

Taking all the provisions of the statute together, we are of opinion that it was the intention of the Legislature to submit to the officer to whom the bond is to be given, all questions as to the qualifications as well as the pecuniary responsibility of the sureties, and that when such officer certifies his approval of the sureties, and the affidavits as to the value of the assets and the responsibility of the sureties are made as required by the statute, and the bond is in the form and for the penalty prescribed, and fixed by the proper affidavits, it is conclusive upon all parties interested in every collateral action, unless it be shown by the creditor attacking the assignment, that it was made for

Klauber, Assignee, v. Charlton.

the purpose of hindering, delaying, or defrauding the creditors of the assignor, within the meaning of Section 2320, R. S., 1878.

The statute provides that the sureties shall be "freeholders of this State, who shall each testify as to his responsibility, and by their several affidavits satisfy the officer," etc. This language, though not the most clear and unambiguous, yet, when taken in connection with the whole object of the statute, seems to us to indicate that the sureties must testify under oath to all the facts necessary to show that they are not only responsible in a pecuniary point of view, but that they have the qualifications which the statute requires, viz., that they are freeholders of the State. The fact of their being freeholders is made by the statute an essential part of their responsibility; they might each be worth ten times the sum required in property within this State, yet if they were not "freeholders of this State," they would not be sufficient and responsible sureties within the meaning of the statute. If the proof made by the sureties at the time of taking the bond shows that they are sufficient, within the meaning of the statute, and the officer approves of them, the assignment cannot be avoided by contradicting the affidavits made by the sureties, unless the proofs go to the extent of showing that the assignee knew that the sureties were not freeholders, or corruptly or fraudulently procured the making of such affidavits; such evidence would attack the *bona fides* of the assignment, and could, undoubtedly, be received.

Nor can the assignment be avoided by showing that the affidavits of the sureties, which are certified to have been sworn to, were not, in fact, sworn to; except, perhaps, when such evidence is offered in connection with other evidence, for the purpose of showing the fraudulent nature of the assignment. (See *Rex v. Smith & Hornage*, 1 Starck, 242; *Rex v. Rivers*, 7 C. & P., 177; *Reg v. Pickerly*, 9 C. & P., 124; *Eastman v. Bennett*, 6 Wis., 232-243; *Frederick v. Clark*, 5 Wis., 191; *Carr v. Bank*, 16 Wis., 50.) As the evidence offered in this case was offered solely for the purpose of showing that the assignment

Jones, Garnishee, v. Syer et al.

was void as not being in compliance with said Chapter 63, we think it was properly excluded.

The general rule is, that when an oath is required to be made before an officer whose duty it is to certify such oath, such oath can only be proved by the production of the proper written evidence, and when produced, is conclusive evidence of the facts therein stated; except, perhaps, in a direct proceeding to set the same aside, or when it has been fraudulently made (1 Wharton on Criminal Law, Section 659; 1 Greenleaf on Evidence, Section 86; *Bassett v. Marshall*, 9 Mass., 312; *Tripp v. Garey*, 7 Greenl. (Me.), 266; *Dale v. Allen*, 4 Greenl. 527; *Harris v. Whitcomb*, 4 Gray, 433); and the same rule is approved by this court in *Lederer v. Railroad Co.* (38 Wis., 254), and *Wright v. Fallon*, unreported. In the latter case, this court held that because the affidavit for an appeal from a justice judgment was not signed by the appellant or any one in his behalf, though certified by the justice to have been sworn to, it was not sufficient to give the appellate court jurisdiction, and that the defect could not be supplied by parol evidence; and in the case of *Lederer v. Railroad Co.*, where a similar affidavit was not signed by the officer administering the oath, the court allowed the same to be perfected, upon proof that the oath was in fact administered, by allowing the officer who had administered the same to sign his name to the *jurat* as of the day it was made. Both cases clearly recognize the rule, that when the law requires an oath to be in writing and certified, no proof of the oath can be given, except by the production of the writing itself, properly certified, unless the same, having once existed in writing, has been destroyed or lost.

The judgment of the Circuit Court is affirmed.

COURT OF APPEALS—MARYLAND.

DECIDED, JUNE, 1879.

Where the certain effect of a clause in an assignment for creditors would be to hinder and delay them, it is void as against them. So, an assignment

Jones, Garnishee, v. Syer et al.

held void, which contained a power to the assignee "to carry on and conduct said business in his discretion for such time as in his judgment it shall be beneficial to do so, or to sell all of said goods and stock in trade and property, at such time, in such manner, and for such price as he may deem proper, and apply the proceeds," etc.

Held, also, that the instrument must speak for itself, and the obnoxious provision cannot be modified or explained by extrinsic evidence.

EDWARD L. JONES, Garnishee of RICHARD W. KIMBALL, v. MARTHA O. SYER and ROBERT SYER.

THIS was an appeal from a judgment in favor of creditors constraining an assignment for the benefit of creditors. The facts are sufficiently embodied in the opinion.

ALVEY, J.—If the property embraced in the assignment to Jones of the 1st of February, 1878, really belonged to Kimball, and the assignment was void as contended by the appellees, the latter were clearly entitled to recovery.

The assignment professes to be for the benefit of creditors generally, and does not exact releases from the creditors as a condition upon which they are allowed to share in the proceeds of the sales of the property assigned; but by the express terms of the deed the trustee, who is the garnishee in this case, is authorized and empowered "to carry on and conduct said business in his discretion, for such time as in his judgment it shall be beneficial to do so, or to sell all of said goods and stock in trade and property, at such time, in such manner and for such price as he may deem proper, and apply the proceeds," etc. It is obvious the certain effect of this clause would be to hinder and delay creditors, and as against them such provision renders the deed utterly void. It is an attempt on the part of the debtor to place his property, for an uncertain and indefinite period, beyond the reach of his creditors, and to make their rights in a great measure dependent upon the uncontrolled discretion of a trustee of the debtor's own selection. The law will tolerate no such attempt, but treats the act as a fraud upon creditors, and the instrument of conveyance as simply void as against them. The cases in this court of the

Jones, Garnishee, v. Syer et al.

American Exchange Bank v. Julves, garnishee of Turnbull & Co. (7 Md., 380); *S. C.* (11 Md., 173), and the recent case of *Maughlin v. Tyler*, (47 Md., 545), are in all respects entirely conclusive of this, and it is unnecessary to refer to other authorities upon the subject.

It was attempted to be shown by the testimony of the trustee and garnishee himself that the discretion given him by the terms of the assignment as to the manner and time of disposing of the property was intended to be exercised for the exclusive benefit of the creditors, and the rejection of such evidence was the subject of first exception taken by the appellant. But it is perfectly well settled that the deed must speak for itself, and that its obnoxious provisions cannot be cited, modified or explained by extrinsic evidence. The cases of *Malcolm v. Hodges* (8 Md., 418), and *Julves v. American Exchange Bank* (11 Md., 173), are conclusive of this question, and the court below was clearly right in ruling as it did upon the offer of this evidence.

As to the second exception taken, that relates to a question of the right of set-off attempted to be set up by the garnishees as against Cleary, one of the grantors in the assignment; but that question has become wholly immaterial, inasmuch as under the instruction of the court the jury have found that the property assigned belonged to Kimball and not to Cleary. A debt due from Cleary to the garnishee constituted no set-off as against the claim of the appellees, upon the assumption that the property assigned, or its proceeds in the hands of the garnishee, belonged to Kimball, the judgment debtor in the attachment; and that question is definitely settled by the verdict of the jury.

Finding no error in any of the rulings excepted to, we affirm the judgment.

Judgment affirmed

In re Stockbridge's assignment.

COURT OF COMMON PLEAS—NEW YORK.

SPECIAL TERM, NOVEMBER, 1879.

Where it is not shown that the money is actually in an assignee's hands, a final decree requiring the payment of money cannot be enforced by attachment as for contempt, but by an execution on as any other judgment for the payment of money.

*In the matter of STOCKBRIDGE'S assignment.**Samuel G. Adams*, for the motion.*Frank K. Pendleton*, for the assignee.

THE decree in this case directed the distribution of seven thousand one hundred and thirty-one dollars and eight cents to certain creditors named, and demand was made on the assignee, to which he answered "that he had no money of the assigned estate referred to in said decree, and could not pay the money required to be paid by said decree, or comply with its terms." A motion was then made for an attachment. In answer to this motion the assignee showed that the funds of the estate were kept by the firm of George W. Kidd & Co., of which he was a member, that his sureties were amply responsible, that his said firm had dissolved, and that he had commenced an action against them to recover these trust funds, which action was then pending.

J. F. DALY, J.—A final decree in accounting cannot be enforced by attachment. Provision for enforcing such a decree is expressly made by Section 22 of the General Assignment Act (L. 1878, C. 318, Section 6, amending L. 1877, C. 466, Section 22). It is there enacted that all decrees in proceedings under this act shall have the same force and effect and may be entered, docketed, and enforced, and appealed from the same as if made in an original action brought in the County Court. Judgments and decrees of the County Court are enforced by execution where the judgment is for a sum of money, or "directs

Miller, Assignee, v. Mulford, Assignee.

the payment of a sum of money" (Code, Section 1240). The judgment being enforceable by execution, the court has no power to punish the party for not paying, by fine and imprisonment (Code, Section 14, Subd. 3). Such was the state of the law prior to the Code (*Hosack v. Rogers*, 11 Paige, 603).

The General Assignment Act above cited provides further (Section 20) that the county judge may exercise such powers in respect to the proceedings and the accounting as a surrogate may by law exercise in reference to an accounting by an executor or administrator. It also provides (Section 25) that the court may exercise the powers of a court of equity in reference to the trust and any matter involved therein. Giving these provisions the effect of controlling the mode of enforcing final decrees in accounting, they do not confer the power of punishing by fine and imprisonment, disobedience to a final decree for the payment of money, since neither the surrogate nor the Court of Chancery could not commit as for a contempt in such a case (*Matter of Watson*, 69 N. Y., 536). Such decrees could be enforced only by execution against the property and against the body. It is plain, however, that these provisions of Sections 20 and 25 give this court full power to punish, by attachment for contempt, disobedience to interlocutory orders for for the deposit, payment or transfer of funds or property in the hands of the assignee, or under his control, and for disobedience to final decrees other than the payment of money. (Code, Section 14, Subd. 3; *Matter of Watson*; *Hosack v. Rogers*, *supra*.)

Motion denied, but as the question is new in these proceedings, without costs.

COURT OF CHANCERY—NEW JERSEY.

OCTOBER TERM, 1879.

An assignee for the benefit of creditors must except to doubtful claims against the estate, which are duly presented to him, within the time limited by statute; the creditor is not estopped by his delay in producing proof of

Miller, Assignee, v. Mulford, Assignee.

the justness of such a claim, nor does the delay excuse the assignee from his neglect to except.

The assignee may purchase the interest of the vendee of the assignor's interest in foreclosure; and, provided he exercises a sound discretion, and it is for the benefit of the estate, he may complete the contracts, and carry on the unfinished business of the assignor, without the order of the court.

ELIAS W. MILLER, Assignee in Bankruptcy, Appellant,
v. DAVID MULFORD, Assignee for benefit of Creditors, Respondent.

THIS was an appeal from a decree of the Union County Orphan's Court. The facts appear in the opinion.

W. P. Wilson and *W. C. Spencer*, for appellant.

J. R. English, for respondent.

The Ordinary.—The appellant, as assignee in bankruptcy, of the late firm of Barton & Spencer, of the city of Elizabeth, caused the respondent to be cited to make his final account as assignee of John Y. Brokaw, under an assignment made under the act "to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors." Barton & Spencer had duly put in, under Brokaw's assignment, a claim of two thousand eight hundred and fourteen dollars and forty cents against the estate. The respondent filed his account, and the appellant excepted to it. The court, on hearing the exceptions, overruled them all. The only subject, however, which appears to have been particularly considered, was the question whether the appellant was not estopped from asserting his claim to a dividend of the estate by reason of the language and conduct of Mr. Spencer, of the firm of Barton & Spencer, in reference to the claim after it was put in. The court held that he was estopped, and, therefore, had no standing to litigate exceptions to the assignee's account. This conclusion, adverse to the appellant on the ground of estoppel, was erroneous.

The claim was, as before stated, duly filed. It showed the debits and credits of the account between the firm and Brokaw,

Miller, Assignee, v. Mulford, Assignee.

and a balance in favor of the former. It appears that the assignee, after the claim was received, understood from Brokaw that the latter claimed that there was a balance due him from Barton & Spencer. The assignee, in reporting the claim, stated it at the amount of the balance, two thousand eight hundred and fourteen dollars and forty cents, claimed by Barton & Spencer, and, at the same time stated that there was an offset in favor of Brokaw's estate of two thousand eight hundred and ninety-four dollars and forty cents, which was the amount of credit, as claimed by Brokaw. Thus the credits, as claimed by Brokaw, were stated as an offset against the balance of the account of both debits and credits, as stated by Barton & Spencer.

There appear to have been threats on the part of the assignee to sue Barton & Spencer for the balance as it appeared on the assignee's statement, and promises on the part of Mr. Spencer to attend to the matter of the counter-claims. It does not appear that he ever admitted that the balance of the account was against his firm; and it appears, on the other hand, from Brokaw's testimony, that the latter never claimed that there was a balance in favor of his estate. The schedule to his assignment shows various items of indebtedness to Barton & Spencer, amounting to about one thousand nine hundred dollars altogether, and he testifies that, when spoken to by the assignee on the subject of the account, he referred him to the accounts themselves; and he adds: "I could not tell how the claim was at that time."

Both the assignee and his attorney seem to have concluded that there was no balance in favor of Barton & Spencer, but, as before stated, Mr. Spencer never said so, or made any admission to that effect. Mr. Barton seems to have taken no part in the matter. The duty of the assignee, however, under the statute, was plain. The claim contained the items of the whole account on both sides, and showed a balance, as before stated, in favor of Barton & Spencer, of two thousand eight hundred and fourteen dollars and forty cents, and it was sworn to by Mr. Spencer. The assignee, if he was not satisfied with

Miller, Assignee, v. Mulford, Assignee.

the justness of the claim, might have excepted to it, and it was his duty to do so if Barton & Spencer insisted upon it, and refused to withdraw it. The assignee could not safely assume that the claim was groundless from any delay in producing proof of it satisfactory to him, or for want of satisfactory explanation.

It appears, by the testimony of the assignee, that when he spoke to Mr. Spencer in regard to the condition of the accounts and the claim that there was a balance due from Barton & Spencer to the estate of Brokaw, Mr. Spencer promised to bring up his books and settle the matter; and it appears, by the assignee's testimony, that at no time did Mr. Spencer ever admit that the claim which his firm had put in was erroneous in any respect. From the evidence, it seems quite clear that the assignee misunderstood the statements made by Brokaw in regard to the claim. There was a difference between Mr. Spencer and Mr. Brokaw as to the amount of the credits to be given to the latter; Brokaw insisting that the amount was more, by about one hundred dollars, than Spencer was willing to allow. The assignee seems to have concluded that this additional credit thus claimed by Brokaw, was a balance claimed by him upon the whole account, whereas, it appears by the schedule to his assignment, before referred to, and by his testimony, that such was not the understanding of Brokaw, and that he did not so insist. The assignee having failed to except, according to law, to the claim, is bound by it.

Of the various exceptions to the account, it is important to notice but a few. It is objected that the assignee became the owner, in partnership with Mr. Blancke and Mr. English, of the principal real estate of the debtor. It appears, however, that the purchase was not made at his own sale, but at the sale of the property under a decree of foreclosure of this court, and that he procured a purchaser at that sale, in order to save the property from sacrifice, and subsequently induced the purchaser to sell him an interest in the property. His conduct in the matter was not only not objectionable, but was praiseworthy.

Miller, Assignee, v. Mulford, Assignee.

thy. He appears to have been actuated by an anxiety to save the property from sacrifice, and by no other consideration. Under such circumstances he cannot be regarded as having purchased the property in trust, or as trustee. (*Earl v. Halsey*, 1 McCart., 332.)

It is objected, that there were sold with that property certain machines, as part of the real estate, which, in point of fact, were not parcel of the realty. The assignee consulted distinguished counsel on the subject, before the sheriff's sale took place, and was advised that all the machinery which was attached by belting, as well as that which was attached to the building otherwise, was part of the realty. Subsequently, by a decision in respect to part of this very property (*Blanche v. Rogers*, 11 C. E. Gr., 563), it was held that some of the machines were not so attached to the realty as to become part of it. It was the duty of the assignee to sell the machines, which were personal property. It appears that they have come into his hands under the foreclosure sale. He is bound to account for them.

Objection is also made that the assignee, without the order of the court, proceeded to complete certain contracts which had been made by the debtor, and which were unfinished at the time of making the assignment. He was at liberty, and it was his duty to do so, under the circumstances. Where it is manifestly for the benefit and advantage of the creditors and those interested in the estate, the assignee may carry on the business and work up the material on hand which otherwise would be, to a degree at least, unavailable to the estate. (*Burrill on Assignments*, 444.) Of course, he is bound to the exercise of a sound discretion. The assignee testifies that he acted in the matter under the direction of the creditors. Opportunity was given, in taking testimony by the exceptants in the Orphan's Court, to inquire into all the particulars in regard to the exercise of discretion on the part of the assignee in this case. He appears to have acted fairly, and with due regard to the interest of the estate. Indeed, it appears that, in his desire to advance the interest of the estate, he has already

Mellen et al. v. Goldsmith.

expended about three thousand dollars more than he has received or will receive.

The decree of the Orphan's Court will be reversed, with costs.

SUPREME COURT—WISCONSIN.

NOVEMBER, 1879.

A creditor, who has made a verbal agreement with his debtor and with other creditors to unite in a composition deed, and who subsequently refuses to sign the same, can only recover the rate specified in such composition deed.

*ABNER MELLEN, ABNER MELLEN, Jr., and
JOHN B. TAYLOR, Appellants, v. BERNHARD
GOLDSMITH, Respondent.*

THIS was an appeal from the Milwaukee County Court. The appellants agreed verbally with the respondent and his other creditors, to compromise their claims against him, and sign a deed of composition for sixty cents on the dollar, the consideration being that the other creditors should also sign and compromise at the same rate, which they did. The appellants subsequently refused to sign, or to receive sixty per cent., which was tendered them in satisfaction of their claim, but brought action for the full amount. The court below held the verbal agreement to be valid, and that appellants were entitled to receive only the amount fixed by the composition deed.

J. F. McMullen, for appellants.

Carpenter & Smiths, for respondent.

ORTON, J.—There was testimony tending to show that the appellants verbally agreed with the respondent and his other creditors, that they would compromise their claims against him, and sign a deed of composition for sixty cents on the dollar, in consideration and upon the condition that the other creditors would do so; and that the other creditors did so compromise and signed such deed; and the appellants refused so to

Mellen et al. v. Goldsmith.

do, and refused to accept such per cent. in satisfaction of their claims, tendered for such purpose by the respondent.

The jury probably, and very properly, might have found their verdict upon this evidence, and this court ought not to disturb the verdict upon the mere weight or preponderance of the evidence.

The evidence relating to the proceedings of the creditors' meeting and their action upon the proposition of the respondent is not material, when it was shown and it is not disputed, that immediately thereafter, all of the creditors except the appellants, signed the composition according to the agreement, which the jury must be presumed to have found was so made by the parties and the other creditors.

The exceptions taken to the rulings of the court, in admitting or rejecting testimony, and in giving or refusing to give instructions to the jury relating to such meeting or its proceedings, are, therefore, immaterial, and will not be further considered.

The instructions given clearly express the law upon the legal effect of such an agreement, and submits to the jury the question of fact, and although there may be some clauses and abstract propositions of law not strictly correct, the charge, taken together and fairly construed, did not, we think, mislead the jury upon the material question in the case.

The really important and only material question here is, was this agreement valid and binding upon the appellants, so that its performance by the other creditors and the respondent, in respect to their claims, and the offer of performance by the respondent in respect to the claims of the appellants, a valid defence to this action, brought to recover the full amount.

The validity of such an agreement does not depend upon the technical and strict rules which govern accord and satisfaction, release and discharge, but upon principles of equity, which treat the violation of, or failure to execute such an agreement, as a fraud not only upon the debtor, but more especially upon the other creditors, who have been lured in by the agreement to relinquish their further demands, upon the supposition that the debtor would thereby be discharged of the remainder

Mellen et al. v. Goldsmith.

of his debts. In *Anstey v. Marden* (1 Bas. & Pull., 124), the plaintiff at one time orally agreed, with the other creditors, to accept a composition of ten shillings on the pound, and to assign his claim to Weston, who was to advance the money; but when the agreement was drawn up, he refused to sign it, although the other creditors had signed it and received their money. Rooke, justice, said: "Anstey is not the only person here concerned. If he were suffered to recover, he would be guilty of a gross fraud on the other creditors."

In *Norman v. Thompson* (4 Exch., 755) the plaintiff verbally agreed with the debtor defendant, and a part of his other creditors, that he would accept ten shillings on the pound for his claim, if they would do the same, and afterward refused to carry out the agreement. Upon demurrer to the replication of the plaintiff, averring that he did not so agree, *modo et forma*, Pollock, C.B., said: "I do not think there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim, that another should do the same."

In *Bradley v. Gregory* (2 Camb., 363) the plaintiff verbally agreed with the debtor and the other creditors, to execute a composition deed containing a clause of release, for and by the payment of ten shillings on the pound of his claim, if the other creditors would do so; and then, upon the execution of the deed by the other creditors, he refused to sign it. Lord Ellenborough said: "I think the agreement in the present case operates as a satisfaction. But it is said, the agreement is executory, and therefore can be no bar. I think it is executed. Everything on the defendant's part was performed. As far as depended upon him, there has been satisfaction as well as accord. It is the plaintiff's own fault that he has not enjoyed the full benefit of all that he stipulated for. It would be unjust if the defendant could be sued in this action, and I am of opinion that, in point of law the action is not maintainable."

In *Wood v. Roberts* (2 Starkie R., 417), in which the facts are similar to those here, Abbott, L.C.J., said: "If the plaintiff had, by his undertaking to discharge the defendant, induced

In re Benson, an imprisoned debtor.

any other creditor to accept a composition and discharge the defendant from further liability, he could not afterward enforce his claim, since it would be a fraud upon that creditor."

In *Butler v. Rhodes* (1 Esp., 236) the plaintiff and the other creditors had agreed with the defendant to sign a deed of composition for ten shillings on the pound, and after the other creditors had signed, the plaintiff refused to do so. Lord Kenyon said: "It, therefore, should never be allowed to the plaintiff to recede from what he had undertaken, and to evade the effect of the composition by a refusal to execute the deed which had been prepared with his consent," and directed the jury to find for the defendant.

Anything I could say in elaboration of this doctrine so authoritatively established and so tersely expressed by these great masters of the law, might weaken its force, and it is sufficient further to say, that this equitable doctrine has been followed almost uniformly by the courts. (*Fellows v. Stevens*, 24 Wend., 294; *Brown & Co. v. Stackpole*, 9 New Hamp., 478; *Paddleford v. Thacher*, 48 Verm., 574; *Gardner v. Lewis*, 7 Gill, 377; *Farrington v. Hogdon*, 119 Mass., 453; *Murray v. Snow*, 37 Iowa, 410.)

The judgment of the County Court is affirmed with costs.

COURT OF COMMON PLEAS—NEW YORK.

SPECIAL TERM, MARCH, 1880.

A discharge from imprisonment of a debtor will be withheld when the proceedings are not just and fair.

In re EDWARD A. BENSON, an imprisoned debtor.

Application for discharge from imprisonment.

Wm. H. Kinkaid and *T. F. Kneeland*, for plaintiff.

Rodman & Adams and *George W. Wingate*, for defendant Benson.

VAN HOESEN, J.—The debtor Benson was one of the firm of Mowe, Cole & Benson, who were lumber dealers in the city

In re Benson, an imprisoned debtor.

of New York for two years, beginning in the spring of 1873 and ending in 1875. Benson was a young man, who had just reached the age of twenty-one years when he became a member of the firm, and he contributed about twenty-one thousand dollars to the capital of the partnership. The firm failed in March, 1875, having assets amounting to about three thousand dollars, and with liabilities amounting to about one hundred and fifteen thousand dollars. A few weeks before their failure the firm bought from Joseph Morris, of Lima, Ohio, a quantity of lumber worth more than twelve hundred dollars. Cole, one of the firm, negotiated the purchase. The lumber was shipped from Ohio about the 15th of March, 1875, and was received by the firm between the 26th and 29th days of that month. On the 26th day of March, before the delivery of the lumber was completed, Mowe, Cole & Benson wrote to Morris that on the previous day (the 25th) they had suspended, and that they could not pay more than ten cents on the dollar, and that they would go into bankruptcy if any of their creditors sued them. There is no doubt, therefore, that on the 25th day of March, 1875, the firm suspended payment, and, of course, it is idle to deny that the members of the firm, who were in New York and aware of such suspension, knew that the partnership was insolvent. Notwithstanding this, Benson sold all the lumber bought of Morris which he could obtain possession of, and he did not account for the avails of the sale. He says he supposes that the check which he received for this lumber was deposited in bank and credited to the account of the firm; but he does not state this as a matter of fact within his knowledge, nor does he explain what became of the money in bank. An attempt is made to show that Benson was not aware of the insolvent condition of the firm; that he supposed that the firm was laboring under a merely temporary embarrassment, and that he sold the lumber because he was told to do so by his senior partner, not knowing anything of the source from which the lumber came, or of the fraud by which it had been procured. From this assumed state of facts, the argument is drawn that Benson was himself the victim of dishonest partners, and that his

In re Benson, an imprisoned debtor.

proceedings have been just and fair, though his associates in business were guilty of fraud in this very transaction. Benson says that the amount received for the lumber he sold was above the market price. It is to be observed, however, that he cannot mention the name of a single person to whom he offered to sell the lumber, nor does he know that he did offer it to any one except the person who bought it; nor is it satisfactorily shown that he now knows what the market price was at that time.

Now, it is proved that this lumber was sold by Benson after the firm had suspended. That fact, standing alone, would not establish fraud; but it further appears by the schedules in bankruptcy, which are sworn to by Benson, that the large indebtedness of the firm, amounting, as had been said, to more than one hundred and fifteen thousand dollars, was principally contracted in the months of January, February, and March, 1875. The amount of the firm debts existing on the 1st of January, 1875, was small, but in the course of the succeeding eighty days, the firm seems to have run in debt everywhere, and not to have paid anybody. They bought lumber on a large scale, gave for it their paper, a good deal of which was payable in April, and then suspended in March without any assets worth mentioning. Is it possible that transactions like these should be just and fair? Ought a member of a firm which embarks in such a career of swindling, and who sells goods which his partners acquire by fraud, to be adjudged to have acted justly and fairly because he makes the unsupported statement that he was not cognizant of the circumstances attending the fraudulent purchases? Is it too much to ask that after his participation in the receipt of money for goods fraudulently purchased has been shown, he shall account for the money? The firm had suspended; its liabilities had swelled in the course of a few months to more than one hundred thousand dollars; its assets were about three thousand dollars; a cargo of lumber then arrived, and it was sold by Benson. Is his statement to be credited that, after the suspension, he believed the firm to be only temporarily embarrassed, and that it could

Laird v. Campbell.

and would continue its business, though it had announced that it could pay no more than ten cents on the dollar?

The facts proven seem to me to show that, believing themselves to be on the point of failing at the close of the year 1874, Mowe, Cole & Benson determined to buy on credit all they could before their condition became known, and to fail before the paper which they might give for their purchases should mature. This plan they put into operation in the first three months of 1875, and the result was the large indebtedness and the small assets appearing in their schedules in bankruptcy. It is possible that the fraud was concealed and arranged by Benson's older and more experienced partners, but upon the evidence as it stands I cannot resist the conclusion that he knowingly shared in the gains resulting from the fraud which was practiced upon Morris.

The discharge must be denied.

In view of the youth and inexperience of the debtor, and of the serious consequences to him of the denial of his application, I will permit the proceedings to be opened for further proof. If a denial of recollection and professions of good faith are all he has to offer, it will be useless for him to avail himself of this leave.

SUPREME COURT—PENNSYLVANIA.

JANUARY, 1880.

A composition between a debtor and a number of creditors is good between all the parties to it, unless the debtor has failed to comply with some of its conditions, or its validity depends upon a certain number of the creditors joining in it.

LAIRD v. CAMPBELL.

ERROR to the Court of Common Pleas No. 3 of Philadelphia County.

All the creditors of plaintiff in error, except one, signed the following agreement, among them the defendant in error :

Laird v. Campbell.

"We, the undersigned, creditors of William W. Laird, hereby agree with him and with each other, that whereas he has become financially embarrassed, and is not able to pay all his debts in full, and whereas both he and we are desirous that he should continue to carry on business in the city of Philadelphia, with a view to paying as great a percentage as possible on the debts now due from him to us; and whereas, we recognize the fact that if he should now turn his available assets into cash in order to pay the said debt, we should each and all of us receive less upon our respective claims, and thereby suffer damages, now we, the creditors as aforesaid, do hereby agree with him and with each other, to accept from said Laird, in full of said claims respectively, thirty per centum of the same respectively; namely, as the amounts are hereinafter set forth opposite our names, and to release said Laird upon the payment of the said thirty per centum, from all further liability on said claims; said thirty per centum to be paid to us in the manner hereinafter set forth, namely, ten per cent., without interest, to be paid within six months from the date hereof; ten per cent. in one year from the date hereof, and ten per cent. in eighteen months from the date hereof, the same to be secured by delivering to us the promissory notes of said Laird, indorsed by a satisfactory indorser for the amounts and the terms hereinbefore expressed.

"Witness our hands and seals," etc.

The affidavit of defence averred that notes were tendered to defendant in error in pursuance of said agreement, but he refused to accept them, and brought suit upon his claim. Judgment was given in favor of plaintiff below for want of a sufficient affidavit of defence.

STERRETT, J.—The second supplement affidavit of defence, filed by the plaintiff in error, discloses the fact that one of his creditors refused to sign the composition agreement in which all the others united. The learned court below considered the defence presented in the three affidavits insufficient, and ap-

Laird v. Campbell.

pears to have based its judgment in favor of the defendant in error solely on the fact above stated. Indeed, it is conceded that, in all other respects, the defence was full and complete. Assuming then, as we must for the purpose of the present contention, that the allegations of fact contained in the affidavits are true, did the refusal of the creditors to sign the agreement render it so far inoperative as to permit the defendant in error to proceed and collect the full amount of his original claim? We are of opinion that it did not. While the bare agreement of a single creditor to accept from his insolvent or financially embarrassed debtor a smaller sum in lieu of an ascertained debt of larger amount is *nudam prae* void for want of consideration, it is now too well settled that a composition agreement between such debtor and several of his creditors is valid and binding on all parties thereto, unless it appears that the agreement was contingent upon *all*, or a certain number of the creditors uniting therein, or the debtor has failed to comply with the terms of the composition. The consideration which supports the agreement of each creditor in such cases, is the understanding of the other compounding creditors to release their common debtor from a portion of their respective claims. The agreement of each creditor with the others and the debtor constitutes a good and valid consideration. After a creditor has thus agreed to relinquish part of his claim, and induced others to become parties to a composition, it would be a fraud on them to permit him to ignore the agreement and collect the full amount of his claim. If authorities in support of this principle be needed, they may be found in 1 Smith's Leading Cases, 600; *Wood v. Roberts*, 3 E. C. L. Rep., 411; *Good v. Cheeseman*, 22 *id.*, 91; *Boyd v. Hind*, 1 Hurlestone & Norman's Rep., 938; *Steinman v. Magnus*, 2 Campbell, 124.

But we do not understand that the correctness of the general principle, as above stated, is questioned by the learned counsel for the defendant in error. His contention mainly is, that the agreement in this case, properly construed, contemplated signing by all the creditors; that, inasmuch as one of them refused to sign, there never was a valid and binding

Laird v. Campbell.

agreement. He insists that the expression, "we, the undersigned, creditors of William W. Laird," means *all* and not a portion of his creditors; that other recitals and expressions contained in the agreement, as well as its expressed object, indicate that it means to include *all* creditors. We cannot assent to this as the correct construction of the paper. Full force and effect may be given to every recital and expression it contains by holding that such of the creditors only as would actually sign the agreement were contemplated as parties thereto. If it had been designed to embrace all creditors, some expression clearly indicative of that intent would have been employed. Nothing is more common than to insert in such agreements a provision that they shall not be binding until all or a specified number of creditors shall sign the same. In the absence of any such provision, it is fair to infer that it is intended to be binding on as many as may sign, without regard to the refusal of others. Indeed, it is impracticable in many cases to secure the joint agreement of all creditors, and, in practice, it is seldom attempted.

The view we have taken of the agreement, on which the defence is based, renders a consideration of the remaining assignments of error necessary; but in regard to the first, it may be added, that while we entertain no doubt as to the right of the court to grant leave to file supplemental affidavits of defence whenever the original is obscure or otherwise defected, we think it is contrary to well-established practice under the Affidavit of Defence Act, to require it to be done. If the defendant chooses to stand upon his affidavit, the court may pass upon its insufficiency, but it has no power to enforce an order to file supplemental affidavits. In this case the order was complied with, and no harm resulted to the plaintiff in error. The last assignment is not sustained. After having recognized the note and copy of book account, which accompanied the *proecipe*, by filing an affidavit of defence, an objection so purely technical at best, lost all its force.

Judgment reversed, and a *procedendo* awarded.

Stewart et al. v. Platt, Assignee.

UNITED STATES SUPREME COURT.

DECEMBER, 1879.

A chattel mortgage executed by a firm, unless it is filed in the city or town where the members of the firm severally reside, as prescribed by the New York statute, is void as against purchases and mortgages in good faith; but such a mortgage is good as between the parties, and as against an assignee in bankruptcy.

STEWART et al. v. PLATT, Assignee.

THIS was an appeal from the U. S. Circuit Court of the Southern District of New York in a suit commenced by the assignee in bankruptcy of Simeon Leland & Co., to obtain, among other purposes, a distribution of a fund arising from the sale of personal property on the foreclosure of several chattel mortgages which had been given to a creditor as a security for rent reserved by a lease. The bankrupts resided in Westchester County and did business in New York City, in which latter place only copies of the chattel mortgages had been filed.

HARLAN, J.—This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, in a suit instituted by the assignee in bankruptcy of Simeon Leland, Warren Leland, and Charles Leland, late partners, under the name of Simeon Leland & Co. The latter were adjudged bankrupts upon the petition of one of their creditors filed on March 24, 1871.

The objects of the suit, so far as they concern the appellants, were—

1st. To obtain a distribution of a fund arising from the sale of furniture and other personal property in use in the Metropolitan Hotel in the city of New York, at the commencement of the proceedings in bankruptcy. The Lelands were lessees of that hotel under a written lease from A. T. Stewart, dated April 30, 1867, for a term of four years thereafter, at an annual rent of \$79,186, payable in equal monthly instalments.

Stewart et al. v. Platt, Assignee.

Upon the property thus sold Stewart held, as security for rent reserved by the lease, several chattel mortgages executed by the Lelands, the validity of which was questioned, in this suit, by the assignee in bankruptcy.

2d. To have a decree declaring sundry judgments against the bankrupts within four months prior to the adjudication in bankruptcy, as well as certain conveyances of real estate to Stewart, to be invalid under the provisions of the bankrupt law, and as against the assignee.

The first question to which we will direct our attention relates to those several chattel mortgages.

The District and Circuit Courts concurred in opinion that they were not filed in the office designated by the Statutes of New York, and, upon that ground, were ineffectual to give the security and lien contemplated by the parties, and void as against the assignee.

By the laws of New York it is provided that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, which should not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, should be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the Act. The statute requires such mortgages to be filed in the town or city where the mortgagor, "if a resident of that State, shall reside at the time of the execution thereof; and if not a resident, then in the city and town where the property so mortgaged shall be at the time of the execution of such instrument." In the city of New York, the mortgage is directed to be filed in the office of the register of said city; in other cities of the State, and in the several towns thereof in which a county clerk's office is kept, in such office; and, in each of the other towns of the State, in the office of the town clerk thereof. Registers and clerks are required to file such instruments, presented to them for that purpose, and indorse thereon the time of receiving the same, and keep them,

Stewart et al. v. Platt, Assignee.

deposited in their offices, for the inspection of the persons interested.

It is further provided that every mortgage, filed in pursuance of the statute, should cease to be valid against the creditors of the mortgagor, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage, a true copy thereof, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him in virtue thereof, shall be again filed in the office of the clerk or register aforesaid, of the town or city where the mortgagor shall then reside.

The bankrupts resided with their families in the county of Westchester, at the respective dates of the several chattel mortgages, but the business of the firm of Simeon Leland & Co., as lessees of the Metropolitan Hotel, was carried on in the city of New York, and all the property covered by the mortgages was in use in that hotel. The mortgages were filed in the office of the register of deeds for the city and county of New York, and were not filed in the towns where the lessees, respectively, resided with their families. The contention of learned counsel for the appellants is that the firm was the mortgagor, that its residence or domicil was in the city of New York, and that the manifest object of the statute was met by filing the several mortgages in the city where the firm carried on its business. The question thus presented is within a very narrow compass, and is not free from difficulty. Its solution depends upon the meaning of the word "reside" employed in the statute. It is to be regretted that we are not guided by some direct controlling adjudication in the courts of New York construing the statute under examination. But no such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual

Stewart et al. v. Platt, Assignee.

members of the firm severally reside. The statute, upon its face, furnishes persuasive evidence that its framers intended to make a sharp distinction between the place where the property might be at the time of the execution of the mortgage, and the place of the mortgagor's residence. If he be a non-resident of the State of New York, the mortgage may be filed in the town or city where the property shall be at the time of the execution of the mortgage. If he be a resident, then his residence, not the actual *situs* of the property, governs. If these instruments be executed by several resident mortgagors, the statute would seem to require that the mortgage be filed in the towns or cities where the mortgagors, at the time, respectively reside.

Some stress is laid upon the fact that, in each of the mortgages, the mortgagors are described as "of the city of New York." If that is to be regarded as a representation by them that their fixed abode was in that city, it is evident that the statute designed for the protection of creditors, subsequent purchasers, and mortgagees in good faith, cannot be thus defeated. Their rights depend not upon recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. The actual residence controls the place of filing, otherwise the object of the statute would be frustrated by the mere act of the parties to the injury of those whose rights were intended to be protected. The recital of the residence in the mortgage "seems to be of no importance, and might, for the matter of security, be omitted altogether." (Nelson, C. J., in *Chandler v. Bunn, Hill & Denio*, New York Supreme Court Rep., 168.)

A good deal was said in oral argument as to the serious inconveniences which may result from any construction of the statute that requires chattel mortgages, executed by a firm upon its property, to be filed elsewhere than in the town or city where the property is used, and where the firm business is conducted. On the other hand, it is quite easy to suggest reasons of a cogent character, why, in view of the manifest purpose of such legislation, the actual residence of the mortgagors should determine the place of filing. But these are considera-

Stewart et al. v. Platt, Assignee.

tions to be addressed more properly to the Legislature of New York, with whom rests the power to make such alterations as experience may suggest to be necessary. The statute expressly declares that a chattel mortgage, not filed as required by its provisions, is void as to creditors, and subsequent purchasers, and mortgagees in good faith; and the circuit judge well said that the statute had "imposed a rigid and unbending condition, to wit, a filing in the place where the mortgagors actually reside, as a preliminary to the validity of the mortgage. Whether this condition is wise or not, whether convenient or difficult of performance, is not for the courts to say. The statute exacts it, and the courts must see that it is performed." Upon this branch of the case, therefore, we concur in opinion with the Circuit Court.

It follows, necessarily, from what has been said, that the Circuit Court rightly adjudged that creditors who obtained judgments and sued out executions against the Lelands, previous to the commencement of bankruptcy proceedings, had prior claims and liens upon the proceeds arising from the sale of the property covered by the chattel mortgages.

But the final decree in the Circuit Court is erroneous in directing the residue of the proceeds of the sale of the mortgage property, after satisfying execution creditors, "to be paid to the assignee (in bankruptcy), for the purposes of the trust," and in charging that balance with the payment of the fees due counsel of the assignee.

In *Yeatman v. Savings Institution* (95 U. S., 766) we held it to be an established rule that "except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt." (*Brown v. Heathcote*, 1 Atk., 160; *Mitchell v. Winslow*, 2 Story, 630; *Gibson v. Warder*, 14 Wall., 244;

Stewart et al. v. Platt, assignee.

Cook v. Tullis, 18 Id., 332; *Donaldson, Assignee, v. Farwell*, 93 U. S., 631; *Jerome v. McCarter*, 94 Id., 734.) He takes the property in the same "plight and condition" that the bankrupt held it. (*Winslow v. McLellan*, 2 Story, 492.)

The decree below is plainly in contravention of this rule. Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the mortgagors and mortgagees. (*Lane v. Lutz*, 1 Keyes, 213; *Westcott v. Dunn*, 4 Duer, 110; *Smith v. Acker*, 23 Wend., 670.) Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith, to complain, as they alone might, of the failure to file the mortgages in the town where the mortgagors respectively resided, it could not be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens, or incumbrances as would have effected it had no adjudication in bankruptcy been made. While the rights of creditors, whose executions preceded the bankruptcy, were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter, representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgageors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the bankrupt law.

It results that the court below erred in directing the fees of the assignee's counsel to be paid out of the residue of the fund in court remaining after the claims of execution creditors were

Stewart et al. v. Platt, assignee.

satisfied. To that balance the appellants are entitled without diminution, to be applied in payment of the rent remaining unpaid, after crediting thereon \$43,500, the agreed valuation of the real estate conveyed to Stewart, and to which we will presently refer in another connection. It was error to charge that balance with the payment of costs or fees of counsel, or any expense incurred by the assignee in bankruptcy in the administration of his trust.

We come now to the questions relating to the several conveyances of real estate made to Stewart in January and February, 1871, all of which were adjudged by the Circuit Court to be void as against the assignee in bankruptcy.

It is important to consider the circumstances under which those conveyances were made. Early in the month of January, 1871, commenced a series of interviews between the lessees and Stewart, brought about, perhaps, by the demand of the latter, through his agent, for the settlement of rent in arrear, which then amounted to about \$50,000. The lessees desired a new lease at a reduced rent, while Stewart insisted upon the payment, or a satisfactory arrangement of the rent due him. The former confessed present inability to discharge the indebtedness in any other mode than by conveyances of real estate, which they urged the latter to take at fair valuation and give a new lease at reduced rent. The lessees, in those interviews, expressed the utmost confidence that such an arrangement would relieve them from all immediate financial burdens, growing out of the hotel business, and enable them to meet promptly thereafter not only instalments of rent, but all other engagements. Stewart finally agreed, for the accommodation of his lessees, to accept certain real estate, offered to him at the aggregate price of \$43,500, in satisfaction of a like amount of back rent, and, necessarily, in extinguishment to that extent of his mortgages upon the furniture and other property in the hotel building. He also signified his willingness to renew the lease to the same parties, at the reduced rent of \$65,000. In pursuance of this arrangement the lessees, or some of them, caused conveyances to be made to Stewart of the real estate in

Stewart et al. v. Platt, assignee.

question, consisting of a farm in Westchester County, and several houses and lots on Crosby, Jersey, and Prince Streets, in New York City.

We are all of opinion that the conveyance, dated February 1, 1871, by Mrs. Warren Leland and her husband, of the farm in Westchester County, was unassailable by the assignee upon any ground whatever. That the property was a gift from the husband to the wife at a time when his right to make it cannot be disputed. As early as 1868 it was distinctly separated from the mass of his property, and the title made to her for her benefit. There is no proof that the conveyance was with any intention to defraud his then existing or future creditors. Of those whose interests the assignee in bankruptcy here represents, or assumes to represent, none, except perhaps one, were creditors of Warren Leland at the date of that conveyance. The bill alleges that the bankrupts, or some of them, intended to give Stewart a preference over other creditors, and to that end, it is charged, Warren Leland caused the conveyance to be made to his wife of the farm in question, "owned by the said Warren Leland, but standing in the name of his wife." But clearly it was not owned by the husband after the execution of the absolute conveyance of 1868. Her rights, by reason of anything appearing in this record, could not be disturbed by the husband's creditors, who became such after the execution of the conveyance to her. She chose, in order to aid her husband, or for other reasons satisfactory to herself, to unite with him in the conveyance to Stewart, thereby surrendering her estate for the benefit of the husband's creditor. Suppose she had not so done, and that the title had remained in her name up to the time of the adjudication in bankruptcy, would it be contended for a moment that the assignee in bankruptcy, or that the creditors of the bankrupts, becoming such after the execution of the conveyance, could have subjected that farm to the debts of Warren Leland against the consent of his wife? This question must, in view of the evidence, receive a negative answer, which shows, conclusively, that the appropriation of the wife's property, by the joint act of herself and husband, to

Stewart et al. v. Platt, assignee.

the payment of the debt of a particular creditor of the latter, is not a matter of which the assignee in bankruptcy, or any subsequent creditor of the husband, can rightfully complain. The decree of the Circuit Court, declaring the conveyance of that farm to Stewart to be void, and requiring Mrs. Stewart to convey to the assignee in bankruptcy, was, for the reasons stated, clearly erroneous.

It remains to consider that part of the decree which declared the conveyances to Stewart of the houses and lots on Crosby, Jersey, and Prince Streets, in New York City, to be void

When those conveyances were agreed to be made, Stewart, as already stated, had an undisputed claim for rent in arrear, amounting to over \$50,000. Under the provisions of the mortgages, a default in the payment of the rent having taken place, Stewart, at the time the exchange was determined upon, could have taken actual possession of the mortgaged property, and sold it for the best price he could obtain in satisfaction of his claim for rent. His right to possession for such a purpose could not have been questioned by any creditor of the lessees who had not, by previous judgment and execution, acquired a lien upon the mortgaged property. (2 Denio, 171; 6 Duer, 99; 35 N. Y., 277; 7 Cowen, 292; 9 Wend., 83-4; 12 Wend., 62.) Instead of exercising that right—a course which would have seriously endangered, if it had not utterly destroyed, the business and credit of the lessees—Stewart, at their earnest solicitation, and for their accommodation, accepted real estate at a fair valuation in satisfaction of rent due and unpaid, thereby surrendering and extinguishing his lien to that extent upon the property described in the chattel mortgages. Of the \$43,500, at which the real estate received by Stewart was valued, \$19,500 represented the farm in Westchester County, which, we have shown, could not have been subjected to the claim of any creditors who became such after the conveyance to Mrs. Leland. In point of fact, therefore, only \$24,000 in value of real estate, belonging to the bankrupts, was received by Stewart, while he surrendered his claim and lien for rent to the extent of \$43,500. This was, in its substance and

Stewart et al. v. Platt, assignee.

effect, a mere exchange of securities, not forbidden by the letter or the spirit of the bankrupt law. In *Cook v. Tullis* (18 Wall., 340), we said that "a fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act, either in its language or object, which prevents an insolvent from dealing with his property, selling it or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors, or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate, or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously." Substantially the same doctrine was announced in *Clark v. Iselin* (21 Wall., 369); *Sawyer v. Turpin* (91 U. S., 120).

These principles would seem to be decisive of the case under consideration. While there is some conflict in the testimony as to certain matters, we have a strong conviction, from all the facts and circumstances established by the proof, that the transaction by which the real estate, at a fair valuation, was substituted for the lien, of like amount, upon personal property, was without any fraudulent purpose. The substitution was not made to give a preference to Stewart. The belief and hope of the bankrupts, expressed in decided terms to him, were that the substitution or exchange would enable them to remove all financial obstacles of a serious nature. They induced him, by earnest representations, to share these hopes. He delayed or forbore the exercise of the right, which, at the commencement of negotiations he undoubtedly had, of taking the mortgaged property into his custody, and disposing of it in satisfaction of his claim for rent. That the arrangement in question did not substantially impair the value of the bankrupt's estate is abundantly clear. His lien, which was extin-

Stewart et al. v. Platt, assignee.

guished by the exchange, exceeded in value that portion of the real estate embraced in the conveyances to him, which the creditors of the bankrupts could have reached under their executions. Reference is made to the fact that the mortgaged property brought only \$43,469.31, and that circumstance is relied upon to show that the exchange did impair the estate of the bankrupts. This argument proceeds upon the assumption either that when the exchange was determined upon he had not a lien upon the mortgaged property, as between him and the mortgagors, or that if he had one, he would not have enforced it by taking the property into his custody, upon a refusal of the lessees to make some satisfactory arrangement. But such assumption is without support in the law or in the proof. Besides, the evidence leads to the conclusion that the mortgaged property sold, at public auction, for less than its fair value. While the witness, who made the inventory and appraisement, testifies that it sold for its full value, the auctioneer, who conducted the sale, testified that with proper appliances, it would have brought fifty per cent. more. It is certain that it sold for much less than either the lessees or Stewart at the time of their negotiations supposed it was worth.

For these reasons, we are of opinion that the court below erred in adjudging the conveyances to Stewart, of the houses and lots on Crosby, Jersey, and Prince Streets, in New York, to be void, requiring Mr. Stewart to convey the same to the assignee in bankruptcy, and declaring his estate liable for the rents and profits of same.

The decree below is reversed, with directions to enter a decree in conformity with this opinion.

FIELD, J.—I concur in the decree of reversal in this case, but I go further than the majority of the court. I think that the chattel mortgages were properly filed with the register in the city of New York. The mortgagors were partners doing business there. They are described in the mortgages as of that city. The property mortgaged was furniture in a hotel situated there, and it is to the records of the city that one would naturally resort to ascertain whether there were any liens upon

In re Frank J. Fowler.

it. The domicile of a firm, under the law requiring chattel mortgages to be filed in the county where the mortgagors reside is, in my judgment, the place where it is located and carries on its business. I am of opinion, therefore, that the chattel mortgages in this case held the property against the judgments of the creditors, and I am authorized to say that Mr. Justice Swayne and Mr. Justice Bradley agree with me in this view.

COURT OF COMMON PLEAS—NEW YORK.

GENERAL TERM, APRIL, 1880.

That which is required on an application for the discharge from imprisonment upon final process in a civil action, is that the proceedings of the debtor in respect to the matters he is required to swear to upon presenting the petition, have been just and fair, and that the affidavit is true.

A discharge cannot be withheld because the debtor has made a false and fraudulent representation as to the solvency of a person to whom credit was given by the person who has obtained a judgment for damages against the petitioner for the deceit.

An application by the prisoner for his discharge as a bankrupt, is not such a disposition of his property as is contemplated by the act; for, whatever property he possesses under such a proceeding goes to his creditors.

In the matter of FRANK J. FOWLER, an Imprisoned Debtor.

THIS was an appeal from an order denying an application of the petitioner Fowler for discharge from imprisonment on final process in a civil action, under Article 6, Chapter 5, Title 1, Part II., of the N. Y. Revised Statutes, generally called the "Stilwell Act."

Riley A. Brick and William W. Campbell obtained a judgment against the debtor Fowler for damages by reason of certain alleged false and fraudulent representations which they claimed he had made respecting the solvency of the Peekskill Iron Company, by reason of which, it was claimed, they were induced to sell to that corporation certain merchandize. The judgment debtor having been imprisoned on the limits for

In re Frank J. Fowler.

three months applied for his discharge under the provisions of the "Stilwell Act." Before the judgment in the action, Fowler & Co., of which firm the judgment debtor was a member, filed a voluntary petition in bankruptcy and were adjudged bankrupts by the United States District Court. The only return of property made by the judgment debtor in his individual schedules in the bankruptcy proceedings was of wearing apparel; but no property of any kind ever came to the hands of the assignee. After judgment in favor of Brick and Campbell, the judgment debtor applied for and obtained his discharge in bankruptcy.

Judge Van Hoesen, to whom the application for discharge was made at Special Term, intimated that the motion should be granted, but denied it in consequence of the opinion of J. F. Daly, J., in the matter of Roberts (unreported). The General Term reversed this decision in the following opinion :

William C. Holbrook, for the petitioner.

George W. Van Slyck, for the opposing creditors.

CHARLES P. DALY, CHIEF JUSTICE.—I fully concur in the conclusions arrived at by Judge Van Hoesen.

Before the passage, in 1831, of the act to abolish imprisonment for debt, no distinction was made between the fraudulent and the honest but unfortunate debtor, but both were alike subject to arrest and imprisonment for the non-payment of their debts.

In the language of Chief Justice Savage, in *Townsend v. Monell* (10 Wend., 581), "previous to the passage of that act, all debtors who had been held to bail must, by the theory of our laws, have been stripped of their property by a writ of *fieri facias*, before they could be imprisoned, and they were then to be imprisoned, not because they would not pay, but because they could not, a state of things exhibiting, in the most glaring point of view, the inhumanity, as well as the impolicy, of imprisoning an honest debtor."

The Act of 1831, therefore, commonly called the "Stilwell

In re Frank J. Fowler.

Act," forbade the arrest or imprisonment of any person upon civil process, in any suit or proceeding instituted for the recovery of money founded upon contract, or for damages for the non-performance of one, except in certain cases, such as the contracting of a debt fraudulently, or the removal or disposition of property with intent to defraud creditors, and provided for an arrest warrant in such exceptional cases, and for a course of procedure by which the property of the fraudulent debtor, if he had any, could be secured and applied to the payment of the judgment, if one existed, or should be recovered; or, if he had no property, for his discharge as an insolvent debtor, under what was known as the fourteen-day act, which is now the 6th Section, 1st Article, Chapter V. of the 2d Part of the Revised Statutes.

The fourteen-day act, which was passed in 1789, and re-enacted with modifications on the 24th of March, 1801, was passed for the purpose of mitigating the severity of the previous law, by which, if a debtor had no property to satisfy the debt, he was imprisoned upon final process, after the recovery of judgment, and after the issuing and return of an execution against his property unsatisfied, and had to remain in prison until the debt was paid; for there was no other means for his release, nor even any provision for his maintenance and support whilst in prison.

The harsh severity of the law in this respect may be illustrated by a declaration of Justice Hyde in *Many v. Scott* (1 Mod., 132), which I have heretofore had occasion to quote in the matter of *Andriol* (22 Daly, 36), which was in these words:

"If a man be taken in execution, and lie in prison for debt, neither the plaintiff at whose suit he is arrested nor the sheriff who took him is bound to find him meat, drink, or clothes, but he must live on his own or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law, and so say I."

The act of 1801 provided for the absolute discharge of a defendant imprisoned on an execution for a debt not exceeding twenty-five dollars, after he had been imprisoned for thirty

In re Frank J. Fowler.

days; and the 4th Section provided that a debtor imprisoned upon final execution for a sum not exceeding five hundred dollars, or who should have remained in jail for the space of three months upon an execution for a sum not exceeding two thousand five hundred dollars; and, in the language of the act, if the debtor imprisoned should "in either case be minded to deliver up to the creditor or creditors who shall so charge him in execution, all his estate and effects toward satisfaction of the debt or debts with which he stood charged;" that he might petition the court, accompanying his petition with the true account of his estate, as it existed at the time of exhibiting his petition, giving also fourteen days' notice to the creditors by whom he was charged in execution of the time and place when the prisoner would make his application to the court; upon which the court, upon the appearance of the prisoner on the day stated, should, if it thought proper, tender to him an oath that the account set forth in his petition was in all respects just and true; that he had not at any time or in any manner or way whatsoever disposed of or made over any part of his estate, real or personal, in law or equity, with a view to the future benefit of himself or family, or with the view or intent to injure or defraud any of his creditors; and the act then declared that if the court should be satisfied that the proceedings on the part of the prisoner were just and fair, that they should immediately order an assignment of the estate, the account of which was contained in the petition, for the benefit of the creditors who had charged the prisoner in execution, and that upon the prisoner executing the assignment, that he should be discharged from custody.

This act made no distinction between the honest, but unfortunate, and the fraudulent debtor, but either was entitled to be discharged if they complied with its provisions. The purpose of it was to discharge the debtor from imprisonment if, in the language of the act already quoted, he "was minded to deliver up all his property to the creditor, that it might be applied to the satisfaction of the debt, and did so, it appearing that he had not disposed of any part of it at any time with a view to

In re Frank J. Fowler.

the future benefit of himself or of his family, or with intent to defraud his creditors, and which he was obliged to declare on oath that he had not, if the court required it, which in practice it invariably did. That act precluded no debtor, after three months' imprisonment on final process, from the benefit of the act, unless one who had disposed of his property for the future benefit of himself or of his family, or with an intent to defraud his creditor, and in this respect, but in this alone, distinguished the honest but unfortunate debtor from one who had fraudulently sought to evade the payment of his debts by dishonestly making away with his property. The provision of the act, that the court should be satisfied that "the proceedings on the part of the prisoner were just and fair," meant that it should be satisfied that his proceedings in this respect, that is, in respect to his property, had been just and fair; whereupon, by the language which follows, the court was then immediately to order the estate contained in the account, presented by the petition, or so much of it as might be sufficient to satisfy the creditor, to be assigned in the manner provided by the act, which, when done, the prisoner was to be discharged by the court from custody. The act further provided that if the creditor should not be satisfied with the prisoner's oath, and desired further time to inform himself, that a further day should be assigned for the hearing of the parties, and unless the creditor should then be able to satisfy the court that the proceedings on the part of the prisoner were not just and fair, the assignment should be ordered, and the prisoner discharged.

This Act of 1801 was again modified by the Act of April 9, 1813 (1 Rev. Laws of 1813, 348), and incorporated with further modifications in the Revised Statutes; but none of these modifications affect in any way the purpose of the Act, as respects the proceedings which are required to be just and fair. The Revised Statutes providing a further means of testing the truth of the affidavit which the prisoner is required to make, by allowing the court to examine the prisoner himself, his wife, or any other person, on oath, on the day appointed for

In re Frank J. Fowler.

hearing and determining, in a summary way, the proof and obligation of the parties.

I have had a great deal of experience in applications of this kind. Innumerable petitions have been made to this court, during the time that I have been in it, for the discharge of persons from imprisonment, in custody, upon final process; and the construction uniformly given, over a long number of years, by myself and my colleagues, has been that what is required is that the proceedings of the debtor have been just and fair, in respect to the matters that he is required to swear to in the affidavit upon presenting his petition; that they relate to the inquiry, whether he has made any such disposition of his property, as in the affidavit he is obliged to swear that he has not; or, other words, whether the judge is satisfied that the statement in his affidavit is true; in respect to which the fullest inquiry may be made by the oral examination of the prisoner under oath as well as the examination of his wife or of any witness which the creditor has to offer.

This is the construction given to the statute in the *People v. White* (14 How., 500), in which Judge E. Darwin Smith says: "As I have repeatedly said, in these cases, that the affidavit which the prisoner is required to make is a key to the meaning of the words that the judge is to be satisfied that the proceedings on the part of the prisoner have been just and fair; that it must appear, as Judge Smith says, "that the affidavit is true in its letter and spirit, or the proceedings of the applicant cannot be just and fair, within the sense and meaning and true intent of the statute." The only difference in the construction of the statute until the recent decision in the case of *Roberts* at the Special Term (ante page 95), referred to in the respondent's points, is that Judge Smith, in the case above referred to, and Judge Ingraham, in the dissenting opinion in the *matter of Watson* (2 E. D. Smith, 429), is that nothing in the shape of property, or interest in property, legal or equitable, existing at the time of the application, shall be kept back or withheld from creditors; that this is the condition upon which the law interposes to discharge the debtor from imprisonment,

In re Frank J. Fowler.

a construction in which Judge Woodruff and myself did not concur, as in our opinion it was engrafting upon the affidavit what was not contained in it; and that any disposition by the debtor of his property, made with the intent to defraud existing creditors, was what the affidavit meant; and that the statute intended that any such disposition on the part of the debtor, or any disposal of his property for the future benefit of himself or family after his application, precluded him from the benefit of the act; a construction which has since been sustained in the *matter of Brady* (8 Hunter, 437), which was affirmed by the Court of Appeals (69 N. Y., 215), and these cases, I think, may be relied upon as sustaining the view that his proceedings are not just and fair where it appears that he has done any of the acts which, by the affidavit he swears he has not done, the object of the statute, as stated by Judge Earl, who delivered the opinion of the Court of Appeals, being the discharge of honest debtors who make an honest and full surrender of all their property for the benefit of all their creditors. This is as I have always held the full scope and intent of this act, from its final incorporation in the Statutes and in its several modifications in 1801, 1830, and in the Revised Statutes, and there is nothing in any of its provisions which, in my opinion, would authorize holding that a debtor cannot be discharged because he made a false or fraudulent representation as to the solvency of a person to whom credit was given by the person who has recovered a judgment for damages against the prisoner for the injury thus sustained; nor is the fact that he applied for his discharge as a bankrupt any such disposition of the property as is contemplated by the Act, for such an application is not a disposition of property for the future benefit of himself or family or to defraud creditors, for whatever property he possesses, under such a proceeding, goes to his creditors, in addition to which there is the fact that he had no property to pass, under his assignment in bankruptcy, and the only effect of his application would be to discharge him from his debts. I think, for these reasons, that the order below should be reversed, that the defendant may

Boese, receiver, etc. v. Locke et al.

be at liberty to renew his application for his discharge from custody.

LARREMORE, J., concurred. JOSEPH F. DALY, J., dissented, for the reasons stated in the *matter of Roberts*, and *matter of Fink*, Superior Court, February, 1880.

Order reversed.

COURT OF APPEALS—NEW YORK.

NOVEMBER, 1879.

The Insolvent Act of 1846, of the State of New Jersey, although in the nature of a bankrupt law, was not suspended by the U. S. Bankrupt Act. Only the 14th Section of the New Jersey Act, which provides for the discharge of insolvents, was suspended. (*Boese v. Locke*, 1 Ins. R. 209, reversed.)

THOMAS BOESE, as Receiver, etc., Respondent, v. WILLIAM H. LOCKE et al., Appellants.

C. Bainbridge Smith, for the plaintiff and respondent.

Martin & Smith, for King, defendant and appellant.

RAPALLO, J.—There is much force in the argument that the 14th Section of the Statute of New Jersey is in the nature of a Bankrupt Law. It enables a debtor to coerce his creditors to discharge him from his debts on receiving a rateable dividend of his existing assets, the only alternative being to relinquish or abandon all claim upon those assets.

Assuming, therefore, that this provision is in the nature of a bankrupt law, and that the exercise by Congress of the power to establish "uniform laws on the subject of Bankruptcies throughout the United States" *ipso facto* suspended the operation of the provision above referred to, the question arises whether the residue of the New Jersey Statute was affected, or whether it continued operative.

The object of the statute, as expressed in its title, was "to

Boese, receiver, etc. v. Locke et al.

secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors." It prohibits preferences, requires an inventory of the debtor's property, and a list of his creditors to be annexed, requires the assignee to give security for the faithful performance of his trust, and prescribes his duties in giving notice of the assignment, advertising for claims, declaring dividends, etc., etc.

To these provisions is superadded the 14th Section, which relates wholly to the effect upon the debtor's claim of accepting a dividend. We are of opinion that there is no such necessary connection between this section and the other provisions of the act as to require that they should fall because of that section becoming inoperative. The act does not create the right to make voluntary assignments, but is restrictive of a previously existing right to make them, and throws salutary safe-guards around the exercise of that right, and in those respects is intended for the protection of creditors. None of those provisions come in any way in conflict with the power conferred upon Congress, nor with the Bankrupt Law, and they are complete in themselves and in no way dependent upon the 14th Section which attempts to provide for the discharge of the debtor from his debts. The 14th Section is a distinct and independent provision for the benefit of the debtor. If this provision was superseded by the Bankrupt Law the consequence was that an insolvent debtor, who, during the existence of that law sought a discharge from his debts, must, for the purpose of attaining that object, have had recourse to proceedings in Bankruptcy. But a debtor who sought simply to obtain an equal distribution of his property among his creditors was at liberty to do so by means of a voluntary assignment. The right to make such assignments was not affected by the Bankrupt Law, but continued in full force, as well in States where there were statutory regulations on the subject, as in States where there were none.

Even if the whole of the New Jersey Statute had been suspended, the right to make a voluntary assignment would still have existed, but we do not think that there was any suspension unless it be of the 14th Section, and that after the passage

Boese, receiver, etc. v. Locke et al.

of the Bankrupt Law a debtor making an assignment in New Jersey was still bound to observe the conditions imposed by that act. If the right to make the assignment had been created by the act, different considerations might enter into the question, and it might be argued that the 14th Section was an essential part of the system and scheme of the act, the destruction of which would invalidate the whole act. It is by no means clear that even in the case supposed this argument could be maintained. But such not being the case, the suspension of the 14th Section affords no ground for holding that the restrictions and safeguards thrown by the body of the act around the right of debtors to make voluntary assignments should be dispensed with, and debtors left at liberty to exercise that right without restriction or regulation.

If, in the assignment now in question, no reference had been made to the New Jersey Statute, it could hardly be pretended that the assignment was assailable. It would stand as valid at common law, even if there were no such statute. But it is claimed that the words of the trust, "to distribute the proceeds to and among the creditors of the said William H. Locke, in proportion to their several just demands, pursuant to the statute in such case made and provided," indicate that the assignment was made under the statute, and that the statute being suspended the assignment must fall.

This has already been answered by our conclusion that the whole statute was not suspended, and that those parts of it which regulate the form of the assignment and the conduct of the assignee remained in force. The reference to the statute was therefore appropriate. But it is further claimed and held in the opinion at Special Term that this reference to the statute shows that the assignor presumed that he would be entitled to the benefit of the provisions of the 14th Section, and being mistaken in that the deed is void.

It does not appear that the assignor has ever claimed to avoid the assignment on that ground, and we apprehend that it would be his right and not that of third parties to do so. But we do not think the ground tenable by any one. If the 14th

Hard v. Milligan et al.

Section was inoperative it was by reason of the provisions of the Constitution of the United States and of the Act of Congress, and of these every citizen is bound to take notice. The legal presumption is, not that the assignor executed the instrument in ignorance of the law, but that knowing the law and knowing that he would not be discharged, and desiring simply to secure an equal distribution of his property and to prevent any creditor from obtaining an unjust preference, he elected to effect this end by means of a voluntary assignment by which his property would be distributed by an assignee of his own selection under the State law, rather than to have it administered by a court of Bankruptcy. That he had the right so to do has been adjudged both by this court and by the Supreme Court of the United States. (*Thrasher v. Bentley*, 59 N. Y., 649; *Haas v. O'Brien*, 66 N. Y., 597; *Mayer v. Hellman*, 91 U. S., 496.)

The judgments of the Special and General Terms should be reversed and a new trial ordered, costs to abide the event.

All concur except FOLGER, and ANDREWS, J. J., absent.

[This cause has been carried to the United States Supreme Court, and will be submitted in the October Term.—Ed.]

CITY COURT OF BROOKLYN—NEW YORK.

GENERAL TERM, 1880.

Where a partner disposes of his interest in the firm property to his co-partner, taking a chattel mortgage on the property to secure the price, and thereafter the latter makes a general assignment for the benefit of creditors, the assignee will be allowed to recover the property from the mortgagee, or from one who claims under him who is not a bonafide purchaser for value; and to do so it is not necessary that the assignee should first recover judgment. Proof of the firm's insolvency when the sale took place and the mortgage was given material.

The action being for a wrongful conversion, the plaintiff has his election to sue one or any number of several joint tort feorsors. Hence, the mortgage creditor is not a necessary party.

HARD v. MILLIGAN et al.

THIS action was brought against Ephraim J. Milligan, Jeremiah Lant, and Isaac F. Bissell for conversion.

Hard v. Milligan et al.

In June, 1878, the defendant E. J. Milligan and Dawson McGrayne were in partnership, when they separated under an agreement by which the latter acquired all the partnership property, and assumed all the partnership debts, he giving to the former a chattel mortgage on the assets to secure the price at which he sold out. The evidence of McGrayne was, that the firm at the time of dissolution was insolvent. In a few weeks McGrayne made a general assignment to the plaintiff for the benefit of creditors; whereupon Milligan assigned the chattel mortgage to a third person, who in turn assigned it to Milligan's wife. Under the latter's instructions, the defendant Lant removed the property to the auction rooms of the defendant Bissell.

Plaintiff obtained judgment from which defendants now appeal.

H. C. Place & A. W. S. Proctor, for appellants.

William Sullivan, for respondent.

McCUE, J.—It is evident that the firm of Milligan & McGrayne, at the time of its dissolution, was very much embarrassed, if not insolvent, and that this was known to both of the parties.

Milligan sold out his interest in the partnership assets to McGrayne, the latter assuming the partnership debts, and executing to the former a mortgage on the assets to secure the payment of the purchase money, to wit.: five hundred dollars in weekly installments of thirty dollars each. The dissolution took place on June 26, 1878, and McGrayne carried on the business until July 24, 1878, when he made an assignment for the benefit of creditors to the plaintiff, who immediately took possession of the property assigned.

Between June 26th and July 24th, McGrayne had paid three weekly installments of thirty dollars each on the mortgage; a fourth one had become due on July 24th, but was not paid. On July 25, 1868, Milligan assigned his mortgage to one Masters, who on the following day assigned it to the

Hard v. Milligan et al.

defendant, Lizzie A. Milligan,* the wife of the original mortgagee.

On July 26, 1878, the defendant Lant, who is a constable, under the authority of the mortgagee, entered the store where the firm business had been carried on, and without the knowledge and consent of the plaintiff carried away the stock and fixtures, being the property described in the chattel mortgage, and being also the property which had been assigned to the plaintiff.

The foregoing facts were fully established by the evidence; and at the close of the case the Court directed a verdict for the plaintiff, submitting to the jury only the question of the value of the goods, etc. From this ruling the defendants appeal.

We are of the opinion that the case was properly disposed of. Milligan and McGrayne, as partners, were each liable for the partnership debts, and the agreement of dissolution, while it changed the relation of the partners as between themselves, did not relieve the retiring partner from liability to the creditors of the firm.

The creditors had still a right to look in the first instance to the partnership assets for the payment of their claims. They had an equitable lien upon the same, and no private agreement between the partners, admitting that it was entered into in good faith, can operate to prevent the application of partnership property to the payment of partnership debts. The mortgage given by McGrayne to Milligan must therefore be presumed to have been given and received with full knowledge of all the equities which might be invoked against it in the event of any question arising affecting the rights of any of the creditors of the firm. Any other principle than this would be a direct temptation to the perpetration of a gross fraud on the rights of the firm creditors—to consummate which it would only be necessary, if a partnership found itself in falling circumstances, for one partner to sell out to another at a consideration large enough to cover the full value of the common

* So in the opinion.

Hard v. Milligan et al.

property, take back a mortgage on the same, foreclose it, and apply the proceeds to the payment of a private debt due from his copartner, which in equity and conscience should be first applied to the satisfaction of the partnership liabilities. Looking at the case from the standpoint of a creditor, all the interest which Milligan could sell in the partnership property or assets was his share "in the surplus of those assets after the partnership debts were paid," and that is all which it was in the power of McGrayne to mortgage.

We think the testimony as to the financial condition of the firm at this time was very material, and properly admitted; and the defendants did not attempt to contradict McGrayne's testimony, that at this time the firm was not able to pay its debts. There is no evidence that any new assets had been added to the stock on hand at the time of the dissolution; and of the receipts from the business, which were estimated at from forty dollars to fifty dollars per week, thirty dollars per week was paid by McGrayne to Milligan on account of the mortgage. It is admitted that nothing was taken by the defendants, but that which had been partnership property.

Beyond the recitals in the assignments of mortgage it does not appear that any valuable consideration was paid by Mrs. Milligan, and she must be held to have taken the mortgage subject to all equities which might have been urged against it. The mortgage covered nothing but partnership property; and it was valid only to the extent that there was any surplus stock or property belonging to either partner after the debts were paid. It appears that there was no surplus. What then could the mortgage operate upon? (See *Staats v. Bristow*, 73 N. Y., 268.)

In view of the established facts in this case, we think the mortgage was fraudulent and void in law as against the partnership creditors, and that the taking of the goods and chattels in question by the defendants was unlawful and wrongful.

When the taking of property is wrongful, it is not necessary to make demand for its return in order to maintain the action.

Under the act of 1858 (Law 1858, Chap., 314), the plaintiff

Stearns, Executor, etc. v. Gage.

as assignee had a right to maintain this action, and in behalf of the firm creditors to treat the transfer by the one partner to the other, and the mortgage given on the transfer, as void (see *Southard v. Benner*, 72 N. Y., 427).

In view of the conclusion which we have reached upon the main question above discussed, it does not seem necessary to refer to the facts that the mortgage covered a stock of goods which were intended to be sold by retail from day to day, as opportunity offered; that the mortgagor continued in possession, and that the mortgage was not filed until after the execution and delivery of the assignment to the plaintiff, and his acceptance of the trust; all of which are of controlling influence in relation to the *bona fides* of the transaction.

These facts are not disputed, and upon this branch of the case there was no question to be submitted to the jury.

One other objection remains to be referred to, viz.: that there was a defect of parties. It is claimed that Mrs. Milligan should have been made a party defendant. This action being for a wrongful conversion, the plaintiff had his election, as in all cases of tort, to sue one or any number of several joint tort-feasors. Where the act complained of is a wrongful seizure of property by one, it is not necessary to join with him in the same action another under whose instructions he acts. This may be done or not at the option of the plaintiff.

We think the case was rightly disposed of, and the judgment must be affirmed with costs.

REYNOLDS, J., concurred.

Judgment accordingly.

COURT OF APPEALS—NEW YORK.

DECEMBER, 1879.

When a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser.

To charge a party with such notice, the circumstances known to him must be

Stearns, Executor, etc. v. Gage.

such as ought reasonably to have excited his suspicion and led him to inquire.

The statute relating to fraudulent conveyances (2 R. S. 13, Sec. 5) provides that its provisions "shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of fraud rendering void the title of such grantor." This means actual notice or knowledge of circumstances which are equivalent to such notice. Merely circumstances to put the purchaser on inquiry, where full value has been paid, not sufficient.

*ADDISON STEARNS, Executor, etc., Respondent, v.
LORENZO P. GAGE, Impleaded, etc., Appellant.*

ACTION to set aside conveyances on the ground of fraud against creditors. The facts fully appear in the opinion.

H. L. Comstock, for the appellant.

W. H. Smith, for the respondent.

MILLER, J.—The plaintiff brings this action mainly for the purpose of vacating two conveyances of real estate, upon the ground that they were fraudulent as against creditors. The first conveyance was made by one Marvin Gage to his son, Franklin B. Gage, on the first day of April, 1871. The farm was subject to a mortgage of four thousand dollars. A mortgage was given for three thousand five hundred dollars to secure a portion of the consideration money, and the sum of one thousand five hundred dollars, which it was then agreed was due from the father to the son, was allowed for work and labor performed by the son for the father after the son became twenty-one years of age, and for the share of the son for working the farm the preceding year, which the father had received. The son also made a note to his father for the sum of five hundred dollars, payable in six months, and at the same time entered into an agreement in writing, by which, in consideration of love and affection, and of one hundred dollars, he agreed to support his father as provided, and to pay him the sum of five hundred dollars on demand, if the father thought it his duty to do so.

By another writing, executed on the fifteenth day of May

Stearns, Executor, etc. v. Gage.

following, the father transferred to the son his farming utensils and farm property, in consideration of twelve hundred dollars, for which three promissory notes were given by the son of four hundred dollars each, payable on time. The son, since he became of age, had resided at home, rendering service on his father's farm under no express agreement, except for one year preceding the sale, when he worked it on shares until the time of the conveyance to him, when he was about twenty-six or twenty-seven years of age. The fair value of the farm at this time, the referee finds, was from ten to eleven thousand dollars.

At the time of the conveyance by Marvin Gage to his son of the farm owned by him, he was largely in debt and insolvent. Considering that a portion of the consideration was for the services of his son for an amount which was not specifically stated, and that a provision was made for the benefit of the father in the arrangement, there was sufficient to warrant the conclusion of the referee that in and by the transaction the parties intended to hinder, delay, and defraud creditors, and that the deed was void against the plaintiff's demand for that reason.

A different question arises as to the deed executed by Franklin B. Gage to Lorenzo P. Gage. The grantee paid the sum of twelve thousand dollars for the farm, which, as we have seen, was found by the referee to have been of less value. Having thus paid a full consideration, and with that fact to rebut any presumption of a fraudulent intent of Lorenzo P. Gage, and with no evidence of knowledge of the latter of such intent between the father and the son, and no proof that the amount secured was misappropriated or not applied to the payment of the debts of Marvin Gage, it is not manifest upon what principle of law the deed to the defendant can be adjudged fraudulent and void.

The ground of liability, as stated by the referee, is that the facts found by him "were sufficient to put the said Lorenzo P. Gage, at the time he purchased and took the deed from said Franklin B. Gage, upon inquiry as to the real nature and in-

Stearns, Executor, etc. v. Gage.

tent of the transaction by which the said Franklin acquired the title from his father, and amount, in law, to a constructive notice of such transaction and the intent with which it was made by the parties thereto," and, as a conclusion of law, "that the facts hereinbefore found were sufficient to put the said Lorenzo P. Gage, at the time he purchased and took the deed from said Franklin B. Gage, upon inquiry," etc. These findings are based upon the supposed knowledge of the defendant, Lorenzo P. Gage, in the summer of 1871, of the affairs of his brother, and that he was embarrassed and pressed by his creditors, notwithstanding he testifies that he supposed him to be good, and he did not know that he was embarrassed. Also upon his knowledge of the agreement of the son to support his father, and that as administrator of the father after his decease he took an inventory of his personal estate, and from the claims presented he must have known that he was insolvent and in failing circumstances at the time he conveyed the farm to his son, and that he knew of the pecuniary circumstances of the son at the time he received the deed from him. We think that these facts were not sufficient to warrant the conclusion of the referee.

The defendant, Lorenzo P. Gage, testified that he understood that Franklin had paid ten thousand dollars besides the agreement to support his father. He also knew that Franklin was allowed one thousand five hundred dollars for his work and services after he became of age, and for his share of the profits of the farm for one year, which is not shown to be an extravagant sum, and, as he swears, Franklin was always a thrifty, provident, and industrious man of good habits. He testifies that he had no design to hinder, delay, or defraud, and that he did not know, and had not been informed at the time of the purchase, that at the time of the conveyance to the son, Marvin Gage had any design to defraud his creditors. The purchase of the farm by Lorenzo P. Gage for more than its value is a strong, and, I think, controlling fact against the finding of the referee; for it is hardly to be supposed, under such circumstances, that the defendant would have been likely to

Stearns, Executor, etc., v. Gage.

commit a fraud, and thus jeopard the validity of the conveyance to himself and render himself personally liable for the debts of his brother Marvin. His whole conduct during the transaction is in direct conflict with any such theory, and tends strongly to establish that he acted in entire good faith and without any fraudulent purpose; and it is proved that he paid a larger value for the farm than it was actually worth, because it adjoined his own farm, and he desired to purchase it for his son. Considering the circumstances to which we have adverted, without any proof that the defendant reaped any pecuniary advantage by the purchase as against the creditors of Marvin Gage, or that any creditor suffered or was defrauded thereby, and with testimony establishing beyond controversy that the consideration was full and sufficient, we are not prepared to hold that he had constructive notice of any defect in the grantor's title and was chargeable with fraud.

The principles which govern and control the doctrine of constructive notice as to fraud, are well defined and familiar. The rule is stated by *Selden J.*, in *Williamson v. Brown* (15 N. Y., 362), to be, that when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser. It is also held in *Baker v. Bliss* (39 N. Y., 70), that to charge a party with such notice, the circumstances known to him must be such as ought reasonably to have excited his suspicion and led him to inquire. In the case at bar it is not apparent that the purchaser was acquainted with any fact, which might create a well-grounded belief that there was any defect in the title of his grantor. There is evidence to show that he had reason to believe, and did suppose, that a full consideration had been paid for the farm, independent of the agreement to support the father of his grantor. He also knew that his grantor had worked for his father for a number of years, and had no occasion to question the validity of the claim

Stearns, Executor, etc., v. Gage.

allowed for his services. Under such evidence it cannot be claimed that any question as to constructive notice was presented upon the trial. Be that as it may, however, we think that this is not material, as actual notice is required where a valuable consideration has been paid. The statute relating to fraudulent conveyances (2 R. S., 137, Sec. 5) provides that its provisions shall not be construed in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of fraud rendering void the title of such grantor. This plainly means that actual notice shall be given of the fraudulent intent or knowledge of circumstances which are equivalent to such notice. Circumstances to put the purchaser on inquiry, where full value has been paid, are not sufficient. If he knew of the fraud that would be enough. It is not found that he had such knowledge in the case considered. As there is no such finding, we may assume that he had no knowledge of the fraud; and without this no case is established which would invalidate the conveyance to him and warrant the conclusion of the referee. No authority has been cited which sustains the principle that a purchaser for a valuable consideration, without previous notice, is chargeable with constructive notice of the fraudulent intent of his grantor; and such a rule would carry the doctrine of constructive notice to an extent beyond any principle which has been sanctioned by the courts, and cannot be upheld.

It follows that the referee was wrong in his conclusion; and for this error the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLGER, J., absent, and RAPALLO and EARL, JJ., not voting.

In re Ward & Peloubet.

COURT OF COMMON PLEAS—NEW YORK.

SEPTEMBER, 1880. SPECIAL TERM.

It being the duty of an assignee to uphold his trust, and not to impeach it, he will not be permitted to show that the assignment was fraudulent and void in any particular.

Where an application is made for a partial accounting, and for the payment of the whole or any part of a creditor's claim, it is discretionary with the court to order or not the payment to be made.

In the matter of the assignment of WARD & PELOUBET.

THIS case was an application on the part of a creditor of one of the assignors to compel the payment of this private debt, which application was resisted by the assignee on the ground, principally, that a preference given by the assignors of this claim was fraudulent and void as against creditors. The facts appear in the opinion.

VAN HOESSEN, J.—It is the duty of a trustee to uphold his trust, and not to impeach it, and for that reason, if there were no other, Diossy would not be permitted to show that the assignment, which he accepted and which he has been executing, was in fact fraudulent and void as against creditors of his assignors. For him to ask the court to adjudge the preference to Israel Ward to be fraudulent, and the assignment void, would be to attack the very title under which he claims. If the assignment be void, he is not the assignee of Ward and Peloubet, and he has no right as a mere volunteer to make any objection to any disposition of the estate which any creditor of that firm may apply for.

It is said that this, though formerly the law, is so no longer, and that Chapter 314 of the Laws of 1858, does, by its very terms, authorize an assignee no less than an executor, administrator, receiver, or trustee of the estate of an insolvent decedent, or an insolvent corporation, partnership, or individual, to disaffirm and treat as void any act, transfer, or agreement done or made in fraud of the rights of any creditors (themselves in-

In re Ward & Peloubet.

cluded) interested in any property of right belonging to the insolvent estate.

The statute provides, that a fraudulent transfer, made by an insolvent decedent, or by an insolvent corporation, partnership, or individual, is to be impeached by an action brought against the fraudulent transferee. Where the fraudulent transfer is an assignment under the general assignment act of 1877, is the assignee to sue himself, and to recover from himself as assignee, property which, when recovered, he must proceed to distribute under the fraudulent and void assignment? It is evident from the mere statement of that proposition that it was not the intention of the legislature that an assignee for the benefit of creditors should attack the very charter by which he holds. Though the meaning of the act of 1858 is not difficult of ascertainment, it is not now necessary to construe it further than to say that it does not empower an assignee for the benefit of creditors to impeach the assignment under which he acts. I decline, therefore, to permit the assignee to show that the claim of Israel C. Ward was fraudulently preferred, and that it ought not to be paid, but that the other provisions of the assignment are valid, and should be carried out. The assignment must all stand, or be set aside entirely.

Where an application is made for a partial accounting, as in this case, and for payment of the whole or any part of a creditor's claim, it is discretionary with the court to order or not the payment to be made. This is obvious from the language of subdivision 4, of Section 20, of the general assignment act, which authorizes the court to direct that such payment be made "as circumstances render just and proper."

In the case before me it is evident that the claim, payment of which I am asked to compel, is, in reality, the private debt of one of the assignors, and not a firm debt at all. It ought not to be paid out of the firm assets, if any creditor of the firm, who is in a position to assail the assignment, is making an effort to bring the question of the legality of the assignment before the court, and the affidavits show that two creditors, one with an execution and the other with an attachment, have

Bergen v. Snedeker et al.

caused the sheriff to levy upon a part of the assigned estate. Though the assignee would incur no risk if he should pay the claim of Israel C. Ward in obedience of an order of the court, it may be that those creditors who have seized the property would lose their debts if so large a sum as three thousand dollars were now paid to Mr. Ward. It is true that those creditors are not before the court on this application, and that they have not applied for the court's protection, but nevertheless, all the facts appearing, I think it better not at this time to order the assignee to pay Mr. Ward. This must not be considered as a decision adverse to Mr. Ward's right to recover the money from the assignee. Unless the assignment be successfully impeached by some creditor in a position to attack it, the claim of Mr. Ward must eventually be paid by the assignee.

No costs to the assignee.

COURT OF APPEALS—NEW YORK.

DECEMBER, 1879.

A referee to ascertain liens in a foreclosure suit has authority to inquire as to the validity of a conveyance or of a mortgage. No reason exists why the fraudulent character of conveyances cannot be tested in these proceedings as well as that of all other liens. The inquiry as to the existence and amount of the lien involves the further question as to its validity.

GEORGE W. BERGEN v. *JENNIE E. SNEDEKER et al.*, Respondents, and *COLES CARMAN*, Appellant.

A REFERENCE in this case, which was a foreclosure suit to ascertain and report the liens and their priorities in regard to surplus moneys having been paid, it was claimed that certain conveyances and mortgages were fraudulent as against creditors, and the question arose whether the referee in such a proceeding had power to inquire into the character of the conveyances and mortgages.

A. N. Weller, for the appellant.

John H. Clayton, for the respondent.

Bergen v. Snedeker et al.

MILLER, J.—In granting the order dismissing the appeal in this case, the court overlooked the fact that the order appealed from imposed costs of the appeal upon the appellant absolutely, and not conditionally, and in this respect was a final determination from which an appeal could lawfully be taken. The motion for a re-argument must therefore be granted, and the order dismissing the appeal vacated.

In this aspect of the case, the questions presented for review upon the appeal are open for consideration.

We think that the referee, by virtue of the order to ascertain and report the liens and their priorities in reference to the surplus money, had authority to inquire as to the validity of the conveyances under which Mrs. Snedeker claimed, and of the mortgage of herself and husband to Clayton. The object of the reference was to ascertain to whom the surplus moneys belonged; and this opens a door to an inquiry as to the character of all liens which may be presented. No reason exists why the fraudulent character of conveyances cannot be tested in these proceedings as well as that of all other liens. One of the objects and purposes of a foreclosure suit is the distribution of the fund arising upon a sale. (*Livingston v. Meldrum*, 19 N. Y., 441, 442; *Beekman v. Gibbs*, 8 Pai., 511, 512.) In the case first cited it was held that the rights and equities of the defendants, who were lienors or claimants of the equity of redemption, are as much before the court, and as much the objects of its care as those of the owner of the mortgage primarily to be foreclosed. Why, then, should not the court have power to ascertain when liens are fraudulent? Where jurisdiction of a court of equity is once acquired, such court, as a general rule, has the right to proceed and do justice between all the parties.

The power of the court to settle questions of this character is also, we think, fully sustained by the decisions. In *Halstead v. Halstead* (55 N. Y., 442), in an action for a partition of lands, it was held that on a reference as to title, a party could attack a mortgage held by another party, on the ground that it was fraudulent and void as against creditors. It was said in

Bergen v. Snedeker et al.

the opinion by Andrews, J., that the inquiry as to the existence and amount of the lien involved the further question as to its validity; and the court having taken possession of the fund for distribution, directs proofs to be taken as to liens, and adjudges the distribution. (See also *Schafer v. Reilly*, 50 N. Y., 61; *Mut. L. Ins. Co. v. Bowen*, 47 Barb., 618.) These cases fully sustain the principle that where a reference is ordered as to surplus moneys, that a lien may be attacked on the ground of fraud, and it matters not, we think, whether the action be a partition or a foreclosure suit. In fact, this is a most convenient practice in the disposition of claims in such cases without the tedious process and the expense of a distinct and separate action for that purpose. The cases relied upon to sustain a different rule are not, we think, of sufficient weight to require especial consideration. *King v. West* (10 How., 333), was a Special Term decision, and in whatever light the other cases relied upon by the respondent may be regarded, they are overruled by the decisions of this court already cited.

The claim that the Clayton mortgage must be sustained, even although the other conveyances are declared fraudulent and void, is not well founded. Clayton had full knowledge of the alleged fraud; knew that a suit had been brought to set aside the deeds on account of the fraud; and, in fact, the mortgage was given to him to secure the payment of his charges for defending the title of Mrs. Snedeker. It is also an answer to this position that the sheriff's certificate of the sale to Carman had been filed and recorded in the county clerk's office long prior to the mortgage, and he had notice not only that the mortgagor's title was fraudulent, but also of the appellant's claim to the property by virtue of the sheriff's sale. (2 R. S., 370, Sec. 43.)

As to the right of Carman to sell and acquire a title under his judgment, it is well settled that where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser will have the right to impeach the conveyance in an action at law to recover the premises. (*Chautauqua Co. Bank*

Smith v. Tighe et al

v. *Risley*, 18 N. Y., 369-375.) He may, but he is not bound to, file a creditor's bill to set aside the conveyance. (See also *Erickson v. Quinn*, 15 Abb. (N. S.), 168.)

The case of *Lamont v. Cheshire* (65 N. Y., 30), is not in conflict with the position stated. The same remark is applicable to *Bookes v. Lansing* (74 N. Y., 437). Carman was not, therefore, bound to bring ejectment or an action to set aside the conveyances, and had a right, we think, to contest the validity of the deeds and mortgages upon the reference.

We have carefully considered all the questions presented and the suggestions made by the respondent's counsel, and are of the opinion that the referee was right, and that the General Term erred in reversing the decision of the Special Term.

The order of the General Term must therefore be reversed, and that of the Special Term affirmed, with costs of both parties upon the appeal to be paid out of the fund.

All concur, except FOLGER, J., absent.

SUPERIOR COURT—NEW YORK CITY.

JUNE, 1880. GENERAL TERM.

Where an assignee for the benefit of creditors has received assets, the discharge in bankruptcy, subsequently, of the assignor, does not affect the relations of the assignee and the creditors of the assignor.

HENRY J. SMITH v. *JAMES G. TIGHE et al.*

THIS action was to compel an accounting by the defendant, Tighe, assignee for creditors of the defendant Thompson. Tighe defended on the ground that after the assignment to him Thompson was discharged in bankruptcy. Plaintiff demurred, and the Special Term overruled the demurrer. The judgment was reversed and the demurrer sustained in the following opinion:

M. Compton, for plaintiff.

J. G. Tighe, defendant in person.

Smith v. Tighe et al.

FREEDMAN, J.—This is an appeal from a judgment and an order entered at Special Term, overruling the demurrer interposed by the plaintiff to that part of the answer of the defendant Tighe, which sets up as a defence the discharge of the defendant Thompson under the United States Bankrupt Act. The action was brought in 1872, by the plaintiff, on behalf of himself and all other creditors of the defendant Thompson, on the first day of December, 1865, who might in due time come in, and its object is to compel an accounting by the defendant Tighe as the assignee of Thompson, for the benefit of creditors.

The most material allegations of the complaint are, in substance, that on the 1st and 2d days of December, 1865, under the laws of the State, Thompson executed an assignment for the benefit of his creditors to Tighe; that by the terms of the assignment Tighe was directed to sell the assigned property and convert it into money, and with the proceeds thereof to pay in full the debts and liabilities existing against Thompson on the 1st of December, 1865, provided there should be sufficient funds for that purpose, and in case there should not be sufficient funds, then to apply the proceeds pro rata to the payment of such debts and liabilities, in proportion to their respective amounts, and in case of a surplus remaining after the payment of such debts and liabilities, to return the same to the assignor; that the notes described in the complaint, amounting together to over seven thousand dollars, were legal debts and liabilities existing against Thompson at the date of the assignment; that Tighe took possession of the assigned property under said assignment and converted the same into money; that he realized therefrom the sum of ninety thousand five hundred and sixty-nine dollars and ninety-four cents, and that out of this he paid dividends to creditors amounting in the aggregate to only three thousand four hundred and fifteen dollars and eleven cents, of which three hundred and thirty-four dollars seventy-two cents only were paid on account of the notes set forth in the complaint.

To this complaint Tighe interposed, among other things, the defence in bar, that on the 6th of July, 1871, Thompson

Smith v. Tighe et al.

applied for, and on the 9th of December, 1871, obtained a discharge in bankruptcy, and a copy of said discharge is set forth in full.

To this defence the plaintiff demurred on the ground that it was no defence as to the defendant Tighe.

In my opinion the demurrer was well taken and should have been sustained on the merits.

Except in a few instances specifically enumerated, but which have no application to the case at bar, the Bankrupt Act, while it was in force, presented the rights of creditors by mortgage, pledge, or other lien upon the property of the bankrupt, whether created by his act or by operation of law, and the assignee in bankruptcy took the property subject to such mortgages, pledges, or other liens. (*Jerome v. McCarter*, 94 U. S. (4 Otto), 734; *Yeatman v. Savings Institution*, 95 U. S. (5 Otto), 764.) And the same courts remained open to the creditors for the enforcement of such vested rights that were open to them before. (*Gyster v. Gaff et al.*, 91 U. S. (1 Otto), 521.)

An assignment for the benefit of creditors made by an insolvent debtor under the laws of a State, in good faith, without intent to defeat the object, impair or impede the operation, or evade any of the provisions of the Bankrupt Act, and which transferred all his property without preferences, was not in violation of the spirit and intent of the Bankrupt Act, and consequently was not void *per se*. (*Thrasher v. Bentley*, 59 N. Y., 649; *Haas v. O'Brien*, 66 N. Y., 597; *Mayer v. Hellman*, 91 U. S. (1 Otto), 496.)

To remove all doubt upon this point, Congress, by Ch. 234, passed July 26, 1876, expressly enacted that no voluntary assignment by a debtor of all his property, made in good faith for the benefit of all his creditors, notably and without creating any preference, and valid according to the law of the State where made, should of itself be a bar to the discharge of such debtor.

In the case at bar, as presented by the pleadings, it is manifest that Thompson by the assignment divested himself absolutely of the assigned property, except as to surplus, and the assigned property became in equity the property of his creditor

Smith v. Tighe et al.

Tighe, though the legal title became vested in him, for the purposes of the execution of the trust, was constituted only the legal agent for the disposition of the property, according to the terms and for the purposes of the assignment, and as such he is accountable to the beneficiaries under the trust. In a suit to compel such accounting it can be no answer for him to say that since the assignment the assignor has been discharged under the Bankrupt Act from the indebtedness to secure which the assignment was made. If the claims now advanced by Tighe in that respect were sound, if the beneficiaries under the trust have not a vested interest in the assigned property and the proceeds thereof, what is to become of the property and its proceeds? Certain it is that neither the property nor the proceeds went into the hands of the assignee in bankruptcy. This being so, can it be then that Tighe can keep the proceeds and appropriate them to his own use, or do they reveal back to the assignor as a discharged bankrupt, without an execution of the trust? The bare statement of the proposition carries with it its refutation. The only effect the discharge pleaded can have in this case, is to discharge Thompson from any balance of indebtedness that may remain after the application of the assigned property and its proceeds by Tighe to the purposes specified in the assignment. The case of the *Ocean Bank v. Olcott* (46 N. Y., 12), does not sustain the claim made here. In that case the creditors had no lien, but by action, brought after the debtor's discharge in bankruptcy, they sought to establish one, under the statute of uses of trusts against real property held by the debtor's wife, by insisting that said property had been paid for out of moneys belonging to the debtor, and that the title to it had been taken by and in the name of the wife in fraud of creditors. The court held that the statute referred to does not give a specific lien upon the property, but an equitable right to be enforced by suit in equity, after all available legal remedies are exhausted; that the commencement of the equitable action and the filing of a *lis pendens* are necessary to constitute a lien; and that, as it appeared, that, before the commencement of the action, the judgment or debt which con-

Adee v. Bigler.

stituted the foundation of it had been extinguished and the relation of debtor and creditor terminated, and the discharge being conclusive upon the State courts, the action would not lie.

The foregoing considerations being decisive of the main question involved, it is unnecessary to consider whether the discharge relied upon was sufficiently well pleaded in point of form.

The judgment and order appealed from should be reversed, with costs, and an order entered awarding judgment to the plaintiff on the demurrer, with costs.

COURT OF APPEALS—NEW YORK.

JUNE, 1880.

To entitle a creditor to the aid of a court of equity in setting aside a conveyance as fraudulent, there must be a judgment, an execution on the same, and a return.

ADEE, Appellant, v. BIGLER, Respondent.

THIS action was brought to set aside a conveyance of real estate by the H. R. & K. Ice Company to the respondent, on the ground that the transfer was made by an insolvent corporation. The plaintiff based his right to recover on the fact that he had a valid claim against the company for money loaned, and demanded judgment for the amount of the claim, and also that the conveyance should be set aside and a receiver appointed.

Peter Van Antwerp, for appellant.

Field & Days, for respondent.

PER CURIAM.—The plaintiff, in his complaint, claims that he has a valid claim against the defendant for money loaned,

Adee v. Bigler.

and asks for judgment for the amount of his claim, and that a conveyance and transfer of the property of the company be set aside, and for the appointment of a receiver.

It is urged that an action can be sustained to set aside the conveyance and transfer upon the ground that it was made by an insolvent corporation in contravention of the statute. There is no force in this position, and the remarks cited from the opinion of Nelson, J., in *McElwain v. Willis* (9 Wend., 548), are not applicable where no judgment has been obtained. That case expressly holds that to entitle a creditor to the aid of a court of equity, there must be a judgment, an execution on the same, and a return. Nor can the action be upheld upon the ground that the appointment of a receiver is necessary to preserve the property from misappropriation and waste, pending the litigation. The cases cited in support of this position are special, where the claim of a party to share in the distribution of a fund is conceded or established, or the proceeding was expressly sanctioned by statute, and the plaintiff is not brought within the rules laid down.

The provision of the Code of Civil Procedure has not changed the practice in this respect, or established any new rule which authorizes an equitable action before a judgment is obtained. While Section 713 may well apply in some cases where the right to or interest in the property is apparent, it does not confer an equitable remedy, under ordinary circumstances, where no judgment has been obtained.

The rule is well settled by a series of adjudications, that until a creditor has obtained a judgment at law for his demand against the debtor, and the return of an execution unsatisfied, an action in equity will not lie to reach assets and apply them to the payment of a moneyed demand arising upon contract. (2 R. S., 173, Sec. 38; *Dunlevy v. Tallmadge*, 32 N. Y., 457; *Beardsley Scythe Co. v. Foster*, 36 Id., 565; *Ocean Nat. Bank v. Olcott*, 46 Id., 12; *McElwain v. Willis*, *supra*.) Before judgment and execution, a creditor at large is not entitled to the interference of a court of equity on the ground of fraud. (*Wiggins v. Armstrong*, 2 Johns. Ch., 144.) Nor do allega-

In re Horsfall to Hesse.

tions of insolvency change this well-established rule. (*Estes v. Wilcox*, 67 N. Y., 264.)

In accordance with the authorities cited, the judgment should be affirmed, with leave to the plaintiff to amend his complaint upon the usual terms.

All concur.

COURT OF APPEALS—NEW YORK.

JUNE, 1880.

*In the matter of the assignment of JOHN H. HORSFALL
to JOHN W. HESSE.*

AN order was obtained *ex parte* discharging the assignee and his sureties from all liability, and cancelling his bond. On motion, the Special Term vacated the *ex parte* order. An appeal to the General Term was taken, and the order vacating the *ex parte* order affirmed. An appeal was then taken to the Court of Appeals.

S. C. Waehner, for the appellants.

George C. Lay, Jr., for the respondent.

PER CURIAM.—This order is not appealable. The order of the Special Term vacated and set aside an *ex parte* order of Judge Van Brunt, discharging the assignees and his sureties from any liability to the creditors of the assignor, and cancelling the assignee's bond. It was in the discretion of the court to vacate that order. The order vacating the order of Judge Van Brunt does not show the grounds upon which it was made. But the affidavits made on the motion presented a case upon which the court could have well decided that the original order was unprecedently granted.

The General Term had power to review the discretion of the Special Term, but this court has no such power.

In re King.

The appeal must be dismissed also, on the ground that the order appealed from is not a final order, within Subdivision 3 of Section 190 of the code.

The order does not conclude the assignee or his sureties in respect to an accounting or discharge. It merely remits them to the proceeding for that purpose, provided by Chapter 466 of the Laws of 1867. The other subdivisions of Section 190 plainly have no application.

Whether Camp had such an interest as authorized him to make the motion was a question which this court cannot review on this appeal. The appeal should be dismissed.

All concur.

Appeal dismissed.

COURT OF COMMON PLEAS—NEW YORK.

SPECIAL TERM, 1880.

A judgment debtor may be discharged from imprisonment under Sec. 2200 of the Code, notwithstanding he has made a general assignment of all his property for the benefit of creditors.

In the matter of BERNARD KING, imprisoned on execution.

APPLICATION for discharge from imprisonment by virtue of an execution under Art. III., Chap. 17, Code of Civil Procedure.

J. F. DALY, J.—The fact that the judgment debtor has made a general assignment of all his property for the benefit of his creditors is no bar to a discharge under Sec. 2200 of the Code. If his seeking a discharge in bankruptcy, before the judgment on which he is imprisoned, be no bar (*Matter of Fowler v. Daly*, 548), it would seem that making a voluntary assignment for the benefit of his creditors should not be a bar.

No other objection to the discharge being made the petition will be granted.

In re Lewis.

COURT OF APPEALS—NEW YORK.

JUNE, 1880.

An assignee, for the benefit of creditors, derives all his power from the assignment. Beyond that, or outside of its terms, he is powerless and without authority, and the control of the court over his action is limited in the same way.

In the matter of the assignment of JOHN W. LEWIS.

A PETITION was presented to the Court of Common Pleas by the assignor's mortgagees asking for an order that the assignee should pay taxes in arrear, the petition averring that the mortgaged lands were an insufficient security. The assignment contained no provision giving any preference to taxes. Further facts appear in the opinion. The application was denied, and this denial was affirmed at General Term. The mortgagees then appealed to the Court of Appeals.

FINCH, J.—The assignor in this case, in 1876, executed his bond and mortgage to Upham and Tucker, as trustees, to secure a debt due to them of twenty-five thousand dollars. In 1879 he made a general assignment to John A. Davenport, in trust, to pay certain preferred creditors in full or ratably, and, out of any surplus remaining, to pay the balance of his indebtedness in full, or so far as the assigned estate would allow. The mortgage contained a provision that upon failure to pay interest or taxes the whole mortgage debt, at the option of the creditor, should become due. That emergency arising the mortgagees commenced an action for the foreclosure of their security, and, through the intervention of a receiver appointed upon their motion, became possessed of the mortgaged lands pending the foreclosure. It appearing that Lewis had failed to pay the taxes of 1877, 1878, and 1879, and a Croton-water tax, the mortgagees presented their petition to the Court of Common Pleas, of the city of New York, reciting the foregoing facts, and asserting that the mortgaged lands were an insufficient security for the debt, and asked for an order that the

In re Lewis.

assignee should pay and discharge the taxes in arrear. The assignment contained no provision giving any preference to taxes, or directing their payment at all except as embraced in the general and unpreferred debts of the assignor. The prayer of the petition was denied, and the order thereupon entered was afterward affirmed by the General Term.

We think the motion was properly decided. The assignee derives all his power from the assignment, which is both the guide and measure of his duty. Beyond that or outside of its terms he is powerless and without authority. The control of the court over his action is limited in the same way, and can only be exercised to compel his performance of the stipulated and defined trust, and protect the rights which flow from it. He distributes the proceeds of the estate placed in his care according to the dictation and under the sole guidance of the assignment, and the statutory provisions merely regulate and guard his exercise of an authority derived from the will of the assignor. The courts, therefore, cannot direct him to pay a debt of the assignor, or give it preference, in violation of the terms of the assignment and the rights of creditors under it. To hold the contrary would be to put the court in the place of the assignor and assert a right to modify the terms of the assignment after it had taken effect against the will of its maker and to the injury of those protected by it. We agree that the assignee is merely the representative of the debtor and must be governed by the express terms of his trust. (*Nicholson v. Leavitt*, 6 N. Y., 519.) The case is not like those to which our attention was asked, of the distribution of a decedent's or a bankrupt's estate. There the law dictates the distribution, because, in the one case, the decedent did not do it during his life, and in the other, by force of direct enactment, the court takes possession of the estate which the bankrupt is unable to hold. But in cases of general assignment the right to control the distribution remains, as yet, in the assignor.

It is claimed that taxes constitute a debt due to the State, and are entitled to preference in payment from an insolvent's

Parsons v. Rhodes, Jr.

effects. That they constitute a debt which the insolvent owes is true, and possibly an abstract right to a preference may belong to the State. But it is not necessary to discuss or determine that question, for the State is not here asserting any such claim. It has been content to rely upon its usual and ordinary modes of collection, and neither to assert nor enforce any such preference. It may never do so, and while it does not we fail to see how an individual can interfere in its behalf. It is not for the plaintiff to say when or how it shall drive its rights to results or assume to vindicate an authority it chooses not to exert. Nor can the assignee, upon the petition of these mortgagees, be required to pay the taxes and water rent accrued since the assignment. If compelled to do so by State or municipal authority he might be allowed the expense. Until then his duty to those interested in his trust requires a different action. They would have a right to insist that he should not incur a needless expense which produced no benefit to the fund but lessened it without necessity. The preference of the State, if it has any, is quite as much over the claim of these petitioners as over those of the general creditors, and we do not discover the equity which could lead us to enforce it against the latter for the benefit of the former.

The order should be affirmed.

All concur.

NEW YORK SUPREME COURT—THIRD DEPARTMENT, GENERAL TERM.

SEPTEMBER, 1880.

Plaintiff's father died, devising his real estate to plaintiff and another son, who entered into possession of the lands so devised. Decedent's personal estate was insufficient to fully discharge his debts, and his creditors having demanded payment of the devisees, they, the individual creditors, and the creditors of the decedent, and three trustees entered into an agreement, whereby the devisees conveyed the devised land to the trustees to sell the same and to apply the proceeds to the payment of the debts therein specified, and to pay over the balance to the assignee of John D. Parsons and to plaintiff, according to their respective interests. The agreement provided that the land should be sold within eighteen

Parsons v. Rhodes, Jr.

months from its date, and the creditors in the same agreement released the devisees from all claims and demands.

Held, That the release was founded upon a sufficient consideration, and that its legal effect was to discharge the debts.

Held, also, that the provision requiring the trustees to sell within eighteen months was a mere direction, and that the property did not revert to the grantors upon the failure to sell within the time directed.

WILLIAM H. PARSONS v. *GEORGE R.
RHODES, Jr.*

THIS was a controversy submitted under Section 1279 of the Code of Civil Procedure.

The facts sufficiently appear in the opinion and in the head note.

H. B. Kinghorn, for plaintiff.

Wm. P. Rhodes, for defendant.

GILBERT, J.—We are of opinion that the release in question was founded upon a sufficient consideration, and that its legal effect was to discharge the debts, and to extinguish the liens of the judgments referred to in the case submitted.

The trust created by the indenture, dated August 22, 1877, was valid, and vested the legal estate in the lands conveyed thereby in the trustees therein named.

The beneficiaries under the trust acquired only a right in equity to have the same enforced for their benefit, but such right will continue until the trust shall have been fully performed.

The claim of the plaintiff that the lands in controversy have reverted to him, by reason of a breach of condition subsequent, namely, that the lands conveyed to the trustees should be sold within eighteen months from the date of the conveyance, cannot, we think, be sustained.

It is true, that a breach of such a condition gives a right of entry to the grantor, and that the possession of the plaintiff would dispense with an action by him to enforce such right. But we think the language of the conveyance, taken as a whole, does not import a condition.

Parsons v. Rhodes, Jr.

The operative parts thereof are in terms absolute, whereby the lands described therein are conveyed to the trustees, to hold the same and every part thereof, unto them and the survivors and survivor of them, and his heirs forever, upon trust, to sell the lands conveyed at such times and in such lots, and on such terms as to them may seem best for the interests of all parties, provided always that the same be sold within eighteen months, etc.

In construing a deed, we are required to give effect to the intention of the parties to it. We think it quite apparent that the clause which provides for a sale within eighteen months was intended as a limitation only of the discretion of the trustees as to the time of sale. One of the trusts was, to pay to the plaintiff any surplus which might arise from a sale of a specified part of the lands conveyed. His interests, therefore, might conflict with those of the other *cestuis que trust*, in respect to the time of selling that part of said lands, and it was proper for the protection of all parties that the trustees should not be vested with an unlimited discretion respecting the time within which the trust should be performed.

The clause referred to, therefore, had no other effect than a direction to the trustees as to the time within which they should perform the trust.

Before the expiration of eighteen months the time of selling rested in their discretion. After the expiration of that period either of the *cestuis que trust* were at liberty to seek a compulsory performance of the trust. But the trust itself does not cease in consequence of the failure of the trustees to fulfill such a direction. (*Wild v. Bergen*, 16 Hun, 128.)

The trustees were not bound to sell the property at the estimated value thereof, stated in the trust deed.

If the views expressed are correct, the defendant should not be compelled to take title, and judgment should be entered in his favor with costs.

Davis, Assignee, v. Howell, Assignee.

COURT OF CHANCERY—NEW JERSEY.

OCTOBER, 1880.

Where a firm makes an assignment for the benefit of firm creditors, and afterward each partner assigns for the benefit of his individual creditors, the firm creditors cannot resort for a deficiency to the individual estates of the partners until their individual creditors shall have been satisfied.

DAVIS, Assignee, v. HOWELL, Assignee.

THIS was a bill for relief. The facts appear in the opinion.

J. F. Dumont, for the complainant.

G. M. & J. G. Shipman, for the defendants.

RUNYON, Chancellor.—John C. Bennett and James M. Andrews were, on or about February 10, 1876, partners in business in Phillipsburg. On that day they made an assignment under the assignment act, for the equal benefit of their creditors, to the complainant William M. Davis. Five days after the making of that assignment Andrews made an assignment under the act for the equal benefit of his creditors to the complainant and Joseph Howell, and about the same time Bennett made a like assignment to Sylvester A. Comstock and Charles F. Fitch. The partnership estate will pay a dividend of only about eleven per cent. of the partnership debts. Most of the partnership creditors have put in their claims under the assignment of Andrews, and claim and insist upon a proportionate participation with his individual creditors therein as to so much of their claims as may not be paid out of the partnership estate, and they threaten his complainant and his co-assignee of Andrews's estate with legal proceedings if their demand be not complied with. The complainant therefore comes into this court for protection and instructions as to his duty in the premises. His co-assignee, Howell, is a creditor of Andrews's estate, and he is made a defendant.

The question presented has been often discussed, and though there exists some contrariety of judicial determination upon it,

Davis, Assignee, v. Howell, Assignee.

must be considered as settled by the great weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate and separate debts out of the separate estate. (Story's Eq. Jur., Sec. 675 ; Snell's Prin. of Eq., 419 ; Story on Part., Sec. 376 ; Kent's Com., 64, 65 ; Pars. on Part., 480.) And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte Crowder* (2 Vern., 706) ; it was affirmed by Lord Hardwicke, and though Lord Thurlow refused to follow it, it was restored by Lord Loughborough and followed by Lord Eldon, and it has existed ever since in the English chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this State. (*Cammack v. Johnson*, 1 Gr. Ch., 163 ; *Matlack v. James*, 2 Beas., 126 ; *Mittnight v. Smith*, 2 C. E. Gr., 259 ; *Scull v. Alter*, 1 Harr., 147 ; *Curtis v. Hollingshead*, 2 Gr., 402 ; *Brown v. Bisstt*, 1 Zab., 46 ; *Linford v. Linford*, 4 Dutch., 113.) In *Scull v. Alter*, the Supreme Court recognized the rule in all its parts. Chief-Justice Hornblower, by whom the opinion of the court was delivered (the question arose under an assignment under the Assignment Act, and was the same as is presented in this case), said : " But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their respective and several estates, then it must be treated as such. The estates and debts must be marshalled ; the partnership effects applied in the first instance to the partnership debts ; the effects of Carhart applied in the first instance to the payment of his sep-

Davis, Assignee, v. Howell, Assignee.

arate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated. (*Camp v. Grant*, 21 Conn., 41.) It has been repudiated also in certain other States. (*Bardwell v. Perry*, 19 Vt., 292; *Emanuel v. Bird*, 19 Ala., 596.) But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration. In *Wilder v. Keeler* (3 Paige, 167), Chancellor Walworth, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: "In the case now under consideration there was at the death of G. F. Lush a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors, being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors upon the principle of this court that equality is equity." The doctrine was recognized in *Morgan v. Skidmore* (55 Barb., 263). In Pennsylvania, in *Bell v. Newman* (5 S. & R., 78, 91, 92), Gibson (afterward chief-justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In *Black's Appeal* (44 Penn. St., 503), and again in *McCormac's Appeal* (55 id., 252), the doctrine is completely recognized and affirmed. In South Carolina in *Woddrop v. Price* (3 Desauss., 203); *Tunno v. Trezevant* (2 id., 264); and *Hall v. Hall* (2 McCord's Ch., 269), the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In *Murrill v. Neill* (8

Davis, Assignee, v. Howell, Assignee.

How., 414), it is recognized by the Supreme Court of the United States.

The objection, that is always pressed as the conclusive argument against it, is that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim as to the balance of his debt, which the partnership assets may not be sufficient to satisfy with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate he will not be deprived of it. (*Wisham v. Lippincott*, 1 Stockt., 353; *Randolph v. Daly*, 1 C. E. Gr., 313; *National Bank v. Sprague*, 5 id., 13; *Howell v. Teel*, 2 Stew. Eq., 490.) But if he has no such lien, and the assets are to be marshalled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will, in like manner and for like reason, give the later preference upon the separate property. Such was the view of Chancellor Kent. He says: "So far as the partnership property has been acquired by means of partnership debts, those debts have in equity a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner." (3 Kent's Com., 64, 65.) The obvious infirmity of the objection to the rule is that it leaves out of consideration the fact that it is

Davis, Assignee, v. Howell, Assignee.

to equity that the joint creditor is indebted for his preference. It is also urged that, instead of the rule, it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of his debt, while the separate creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate, and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there are in the case of all such rules, instances in which it works unsatisfactorily, yet that on the whole, and as a rule, it has not operated unjustly is evidenced by the fact that it has existed so long (*Ex parte Crowder* was decided in 1715), notwithstanding opposition, and that in Massachusetts at least it has, in the face of the opposition referred to, been established by legislative authority, and that too as lately as 1838. In this State it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in *Wisham v. Lippincott* (1 Stockt., 353, 356) the chancellor expressed strong doubt of its correctness as a general rule; but in the other cases before cited, both previous and subsequent, the rule has been recognized without any expression of disapprobation or dissatisfaction.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets which may remain after payment of the separate debts. The costs of the parties will be paid out of the funds represented by the complainant—the partnership estate—and Andrews's estate in equal shares.

Solinger v. Earle et al.

COURT OF APPEALS—NEW YORK.

JANUARY, 1881.

The plaintiff, having given to the defendants a note for the balance of their debt against him, after deducting the amount of the composition, in pursuance of a secret agreement and to induce them to enter into the composition, was obliged to pay the note, which subsequently came into the hands of a *bona fide* holder before maturity; he then sued to recover the money so paid.

Held, That the agreement was void as against public policy, yet the Courts could not aid either party as against the other.

DAVID SOLINGER, Appellant, v. EDWARD EARLE, et al., Respondents.

APPEAL from a judgment affirming a judgment of the Supreme Court, General Term, in favor of defendants.

The facts sufficiently appear in the opinion.

Abraham Kling, for appellant,

William M. Ivins, for respondents.

ANDREWS, J.—The plaintiff, to induce the defendants to unite with the other creditors of Newman & Bernhard in a composition of the debts of that firm, made a secret bargain with them to give them his negotiable note for a portion of this debt beyond the amount to be paid by the composition agreement. He gave his note pursuant to the bargain, and thereupon the defendants signed the composition. The defendants transferred the note before due to a *bona fide* holder, and the plaintiff, having been compelled to pay it, brings this action to recover the money paid.

The complaint alleges that the plaintiff was the brother-in-law of Newman, and entertained for him a natural love and affection, and was solicitous to aid him in effecting the compromise, and that the defendants, knowing the facts and taking an unfair advantage of their position, extorted the giving of the note as a condition of their becoming parties to the composition.

We think this action cannot be maintained. The agree-

Solinger v. Earle et al.

ment between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition was a fraud upon the other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character.

A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share to induce him to unite in the composition is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principle of equity and the mutual confidence as between creditors, upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction. If the defendants here were plaintiffs, seeking to enforce the note, it is clear that they could not recover. (*Cockshott v. Bennett*, 2 Term R., 763; *Leicester v. Rose*, 4 East., 372.) The illegality of the consideration, upon well-settled principles, would be a good defence. The plaintiff, although he was cognizant of the fraud and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, according to the general principle applicable to executed contracts, void for illegality, have maintained an action to recover back the money paid. The same rule, which would protect him in an action to enforce the note, would, in case the

Solinger v. Earle et al.

note had been paid, protect the defendants in resisting an action to recover back the money paid upon it. (*Nellis v. Clark*, 4 Hill, 429.)

It is claimed that the general rule, that a party to an illegal contract cannot recover back money paid upon it, does not apply to the case of money paid by a debtor, or in his behalf, in pursuance of a secret agreement exacted by a creditor in fraud of the composition, and the cases of *Smith v. Bromley* (2 Dou., 696), *Smith v. Cuff* (6 M. & S., 160), and *Atkinson v. Derby* (7 H. & N., 934) are relied upon to sustain this claim. In *Smith v. Bromley*, the defendant, being the chief creditor of a bankrupt, took out a commission against him, but afterward finding no dividend likely to be made, refused to sign the certificate unless he was paid part of his debt, and the plaintiff, who was the bankrupt's sister, having paid the sum exacted, brought her action to recover back the money paid, and the action was sustained. Lord Mansfield, in his judgment, referred to the statute (5 Geo. II., Chap. 30, Sec. 11), which avoids all contracts made to induce a creditor to sign the certificate of the bankrupt, and said: "The present is a case of a transgression of a law made to prevent oppression, either on the bankrupt or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted, and advantage taken of her situation and concern for her brother." And, again: "If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compassion of his family."

In *Howson v. Hancock* (8 Term R., 575), Lord Kenyon said that *Smith v. Bromley* was decided on the ground that the money had been paid by a species of duress and oppression, and the parties were not in *pari delicto*, and this remark is fully sustained by reference to Lord Mansfield's judgment.

Smith v. Cuff was an action brought to recover money paid by the plaintiff to take up his note given to the defendant for the balance of a debt owing by the plaintiff, which was exacted by the latter, as a condition of his signing, with the other creditors, a composition. The defendant negotiated the note

Solinger v. Earle et al.

and the plaintiff was compelled to pay it. The plaintiff recovered. Lord Ellenborough said: "This is not a case of *par delictum*; it is oppression on the one side and submission on the other; it never can be predicated as *par delictum* where one holds the rod and the other bows to it."

Atkinson v. Derby was the case of money paid directly by the debtor to the creditor. The action was sustained on the authority of *Smith v. Bromley* and *Smith v. Cuff*.

It is somewhat difficult to understand how a debtor who simply pays his debt in full can be considered the victim of oppression or extortion, because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not in *pari delicto*. (See remark of Parke, B., in *Higgins v. Pitt*, 4 Exch., 312.) But the cases referred to go no further than to hold that the debtor himself, or a near relative, who, out of compassion for him, pays money upon the exaction of the creditor, as a condition of his signing a composition, may be regarded as having paid under duress, and as not equally criminal with the creditor. These decisions cannot be upheld on the ground simply that such payment was against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind, but this is no legal ground for allowing one wrongdoer to recover back money, paid to another in pursuance of an agreement between them, void as against public policy.

It was conceded by Lord Mansfield, in *Smith v. Bromley*, that when both parties are equally criminal against the general laws of public policy, the rule is *portior est conditio defendentis*, and Lord Kenyon, in *Howson v. Hancock*, said that there is no case where money has been actually paid by one of two parties to the other upon an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back.

It is laid down in Cro. Jac., 187, that "A man shall not avoid his deed by duress of a stranger, for it hath been held that none shall avoid his own bond for the imprisonment or

Solinger v. Earle et al.

danger of any one than himself only." And in *Robinson v. Gould* (11 Cush., 57) the rule was applied where a surety sought to plead his own coercion, as growing out of the fact that his principal was suffering illegal imprisonment, as a defense to an action brought upon the obligation of the surety given to secure his principal's release. But the rule in *Cro. Jac.* has been modified so as to allow a father to plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent. (*Wayne v. Sands*, 1 Freeman, 351; *Bayley v. Clare*, 2 Browne, 276; 1 Roll. Abr., 687; Jacob's Law Dict., "Duress.")

We see no ground upon which it can be held that the plaintiff in this case was not in *par delictum* in the transaction with the defendants. So far as the complaint shows, he was a volunteer in entering into the fraudulent agreement. It is not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which *Smith v. Bromley* was decided, we are of opinion that the doctrine of that and the subsequent cases referred to can only be asserted in behalf of a debtor himself, or of a wife or husband or near relative of the blood of the debtor who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage with a debtor, who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs.

The plaintiff cannot complain because the defendants negotiated the note so as to shut out the defense which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of negotiability show.

It is possible that the plaintiff, while the note was held by the defendants, might have maintained an action to restrain the transfer and to compel its cancellation. (*Jackson v. Mitchell*, 13 Ves., 581.) But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although

Talcott v. Rosenthal.

under the coercion resulting from the transfer, the law leaves him where the transaction has left him.

The judgment should be affirmed.

All concur.

SUPREME COURT NEW YORK—FIRST DEPARTMENT, GENERAL
TERM.

NOVEMBER, 1880.

The mere fact that a debtor, who has made an assignment with preferences, purchased goods shortly before making the assignment, for which he had no reasonable hope of paying, is not sufficient evidence of a fraudulent disposition of property.

TALCOTT v. ROSENTHAL.

THIS was an appeal from an order made at the Special Term, denying the defendant's motion to vacate an attachment

A. Cardozo, for appellant.

H. F. Hatch, for respondent.

BARRETT, J.—Stripping the plaintiff's affidavits of the charges and conclusions with which they abound, also of mere hearsay, we find the following facts: Between the 28th of last July and the 1st of the following September, the defendant purchased goods from the plaintiff to the amount of two thousand two hundred and sixty-five dollars and seventy-nine cents upon a credit of sixty days. Nine days after the last purchase the defendant made a preferential assignment. The preferences aggregated forty-three thousand one hundred and fifty-seven dollars and thirty-eight cents. The day after the assignment was made, Mr. Trowbridge, a gentleman in the employ of plaintiff, went to defendant's store. There he found the assignee. The defendant was not present, and the assignee stated that he did not know where he was. Mr. Trowbridge discovered but one case of the goods which had been purchased from the plaintiff.

Goodman v. Niblack.

The stock in the assignee's hand was slight, not, in Mr. Trowbridge's opinion, exceeding twenty thousand dollars in value. On the same day the plaintiff's bookkeeper applied to the assignee for permission to inspect the books, but this was refused, and the assignee declined to give him any information.

These facts do not furnish sufficient evidence of a fraudulent disposition of property. The assignment is attacked, but the genuineness of the preferences is not impugned. There is hardly enough to go to a jury upon the question of fraud in obtaining the goods. But even if the goods were purchased with intent not to pay for them, it does not necessarily follow that the assignment was made with the design of defrauding creditors. Fraud in the purchase would undoubtedly color the subsequent acts. The connection might even be so close and well defined as to indicate a fraudulent purpose throughout, in effect, that the disposition was but the culmination of the scheme which originated in the purchase. But we can lay down no such general rule as that every preferential assignment is to be treated as a fraudulent disposition of the debtor's property, merely because, shortly before its execution, he purchased goods for which he had no reasonable hope of paying. That is the case upon the evidence now before the court. It follows that the order should be reversed, with ten dollars costs, and the disbursements of the appeal, and the attachment vacated.

UNITED STATES SUPREME COURT. .

OCTOBER, 1880.

The United States Statute (U. S. R. S., Section 3447) inhibiting "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein," does not prevent the passing of such a claim to the assignee for the benefit of creditors.

CHARLES GOODMAN, Appellant, v. WILLIAM E. NIBLACK.

APPEAL from the Circuit Court of the United States for

Goodman v. Niblack.

the District of Indiana, dismissing the complainant's bill on demurrer. The facts appear in the opinion.

MILLER, J.—This is an appeal from the Circuit Court of the United States for the District of Indiana, dismissing the complainant's bill on demurrer.

There came into the hands of the defendant, as administrator *de bonis non* of the estate of Albert G. Sloo, the sum of one hundred and fifty thousand dollars, and the plaintiff is the owner of a judgment against said Sloo for thirty-one thousand three hundred and forty-four dollars and forty-four cents. recovered in the Supreme Court of the State of New York, on the 20th day of January, 1855. The purpose of the present bill is to follow this money in Niblack's hands as a trust fund devoted by Sloo in his lifetime to the payment of the plaintiff's judgment. This trust arises, if it exist at all, out of a deed of assignment made by Sloo of all his property, rights, and credits to Benjamin H. Cheever and James Wiles, of the date of February 3, 1860, for the benefit of all his creditors, but with some preferences, among which is the judgment of complainant. The sum above mentioned was received by Niblack as the share of Sloo's estate in a claim of over a million of dollars recovered in the Court of Claims against the United States, and paid by the Government to Marshall O. Roberts and Edward Dickerson, in whose names the judgment was recovered. The history of this claim, which is necessary to an understanding of the case in hand, is this:

The fourth Section of the Act of Congress of March 3, 1847, Chapter 62 (9 U. S. Statutes, 187), directed the Secretary of the Navy to contract with Sloo for the transportation of the mails of the United States from New York to New Orleans, Charleston, Savannah, Havana, and Chagres and back twice a month, at a compensation not to exceed the sum of two hundred and ninety thousand dollars. The mail was to be carried in steam vessels of a character described in the act, not less than five in number, to be constructed under the supervision of officers of the navy, in such manner as to be easily converted

Goodman v. Niblack.

into war steamers of the first class. Under this authority the secretary and Sloo executed a written contract on the 20th day of April of that year, for the construction of the ships and transportation of the mails at the sum of two hundred and ninety thousand dollars per annum. On the 17th day of August thereafter, Sloo entered into an agreement with Marshall O. Roberts, George Law, Prosper M. Wetmore, and Edwin Croswell, by which they were taken into this contract with him, and agreed to build the vessels, and run them, and perform the obligations of Sloo to the Government, and Sloo was to receive one-half of the net profits of the venture, and the four persons named the other half. In order to the perfect working of this agreement, a tripartite instrument in writing was made, in which Sloo is called the party of the first part, and Roberts, Law, Wetmore, and Croswell the party of the second part, and George Law, Marshall O. Roberts, and Berres R. McIlvaine, party of the third part, whereby, after reciting the agreement between the party of the first part and the party of the second part, the contract of Sloo is assigned to the party of the third part as trustees for the due execution of the agreement. This was signed by all the persons named.

The ships were built, the mails carried for many years, and by death and substitution, Marshall O. Roberts and Edward Dickerson became the surviving trustees under the agreement, and in a controversy with the United States recovered as such trustees in the Court of Claims the sum of one million and thirty-one thousand dollars as money due under the original contract with Sloo, which judgment was affirmed in this court, and the money paid to Roberts and Dickerson.

In the meantime Sloo had become insolvent and executed the general assignment to Cheever and Wiles, already mentioned, in 1860, and had died before the final payment of the money by the Government to Roberts and Dickerson, and Niblack had been appointed his administrator.

These facts are all set out in the bill, and copies of the several contracts and assignments are filed as exhibits. Another averment of the bill is that the sum really due to Cheever and

Goodman v. Niblack.

Wiles, as assignees of Sloo, out of the sum paid by the Government, was one hundred and eighty-two thousand dollars; that Cheever and Wiles received thirty-seven thousand dollars of this money, and consented to the payment of the remaining one hundred and fifty thousand dollars to Niblack under some arrangement not understood by complainant. It is also alleged that all the other indebtedness of Sloo which might have been a claim on this fund under his assignment to Cheever and Wiles has been paid, and there remains no other claim on it than complainant's. It is also averred that Wiles and Cheever are not citizens of Indiana and cannot be served with process, and are not made parties to the bill, and for the reasons above stated are not necessary parties.

The demurrer is, first, general, and, secondly, special as regards the failure to make Cheever and Wiles parties.

The general demurrer is maintained on the ground that the assignments made by Sloo are void by reason of the provisions of Section 3477 of the Revised Statutes. These provisions were enacted by Congress in 1853 (10 U. S. Statutes, 170), and were, therefore, not in force when Sloo made his contract with the Government, nor when he made his agreement with Roberts, Law, and others, and that agreement remains unaffected by the statute. It was in force, however, when he made the general assignment of all his effects to Cheever and Wiles, and, as complainant claims through that assignment, and can probably succeed only in that way (because, as we are informed, the State court of Indiana has decided that the statute of limitations bars the complainant's claim as an ordinary debt), we must inquire whether that assignment is void under the act of Congress.

The statute has several times within the last few years received the consideration of this court. (See *United States v. Gillis*, 95 U. S. R., 407; *Spofford v. Kirk*, 97 U. S. R., 484; *Erwin v. United States*, id., 392.)

And it is understood that the Circuit Court sustained the demurrer in this case under pressure of the strong language of the court in *Spofford v. Kirk*. We do not think, however,

Goodman v. Niblack.

that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs, as laid down in that opinion, and in the others referred to, were mainly two :

First. The danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.

Second. That by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest.

Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was the protection of the Government, and not that of the parties to the assignment. The case of *Erwin v. The United States* (97 U. S. R., 392), decided at the same term as *Spofford v. Kirk*, is suggestive on this point. It was there held that the claim of a person declared bankrupt, against the United States, passed by the assignment in the bankruptcy proceeding to the assignee, and that the assignee, and not the original claimant, was the proper person to sue in the Court of Claims. "The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute of 1853 was aimed," said the court. The language of that statute includes "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein." These words are broad enough (if such were the purposes of Congress) to include transfers by operation of law, or by will. Yet in that case we held it did not include transfers by operation of law, or in bankruptcy, and we said it did not include a transfer by will. The obvious reason of this is that there can be no purpose in

Goodman v. Niblack.

such cases to harass the Government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim. That in such cases the exigencies of the party who held the claim justified and required the transfer that was made. In what respect does the voluntary assignment by an insolvent debtor of *all his effects*, for the benefit of all his creditors, which effects must, if the assignment is honest, include a claim against the Government, differ from the assignment which is made in bankruptcy? There can be here no purpose to bring improper means to bear in establishing the claim, nor can it be readily seen how the Government can be embarrassed by such an assignment. The claim against the Government is not specifically mentioned, and is obviously only included by the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil at which Congress aimed in the Act of 1853.

It is also to be remarked that the Government had recognized Sloo's original assignment of his contract to Roberts, Law, and McIlvaine, as trustees, by permitting them to perform the contract and receive the pay under it for years, and when a dispute arose as to the sum due under that contract, Congress, by the Act of July 14, 1870, very fully recognized the validity of that transfer.

That act is in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the trustees of Albert G. Sloo, for compensation for services in conveying the United States mails by steamers, direct between New York and Chagres, in addition to the regular service required under the contract made between the said Albert G. Sloo and the United States, be, and the same is hereby referred to the Court of Claims; and the said court is hereby directed to examine the same, and determine and adjudge whether any, and if any, what amount, is due said trustees for said extra service, provided that the amount to be awarded by

Goodman v. Niblack.

said court shall be upon the basis of the value of conveying other first-class freight of like quantity with the mails actually carried between the same points at the same time."

This is still further recognized by the appropriation to pay this judgment "to Marshall O. Roberts and Edward Dickerson, surviving trustees of A. G. Sloo, found in Chapter 3 of the Second Session of the Forty-fifth Congress." (20 U. S. Stat., 7.)

The first agreement of Sloo, therefore, is unassailable.

His assignment to Cheever and Wiles, in 1860, conveyed only his interest in the profits of the contract which the parties in the first assignment were performing or had performed for the Government.

The general assignment of Sloo, in 1860, gave Cheever and Wiles no right to assert a claim against the Government. They could only deal with the trustees under the first assignment, and on them they had only the claim for net profits which came into their hands. Cheever and Wiles and the present complainant were neither of them capable of suing the United States in the Court of Claims or of presenting the matter before the accounting officers of the Government, and could give no valid or just acquittance to the Government for any part of the claim.

We do not think the transfer to Cheever and Wiles, as trustees for Sloo's creditors, is forbidden by the act of 1853, or by any other principle of law or of public policy.

But we are of opinion that Cheever and Wiles are not only proper but necessary parties to this suit. The entire sum to which the estate of Sloo could possibly be entitled was assigned to them. The trust on which it was assigned remains unexecuted. They are charged with having received thirty-seven thousand dollars of that fund. What have they done with it?

If, as alleged in the bill, there are no other debts of Sloo secured by the assignment, this sum in their hands should be accounted for before a decree against Sloo's administrator. They are charged with consenting to the payment to the administrator of the fund now sought in this suit. There may

Goodman v. Niblack.

have been good reasons for it, and if not, they may be personally liable for it. The fund can only be subjected to the complainant's debt through these trustees. It is only in right of the assignment to them that plaintiff proceeds. They are living, and cannot be divested of this trust by any decree to which they are not parties. The administrator has a right, if decree is rendered against him, to have it made effectual against them.

Notwithstanding the allegation of the bill that all the liabilities of the trust fund except plaintiff's debt have been discharged, this may not be so, and it may be in the power of these trustees, and it may be their duty, if made parties to this suit, to show that there are others entitled to share in it. No decree against that fund can rightfully be made while they are not before the court.

This, however, need not defeat the jurisdiction of the court if the bill is amended by making them defendants.

This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, Section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant.

If the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, we should have been bound to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any other suit. It must, therefore, be reversed and remanded to that court. If the complainant shall ask leave to amend his bill by making Cheever and Wiles defendants, he should be permitted to do so and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits. (*Shields v. Barrow*, 17 How., 130; *Barney v. Baltimore City*, 6 Wall.,

Woodworth et al. v. Seymour et al.

280; *House v. Mullin et al.*, 22 Wall., 42; *Kendig v. Dean*, 97 U. S. R., 423.)

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings in that court in conformity with this opinion.

SUPREME COURT, NEW YORK—THIRD DEPARTMENT, GENERAL TERM.

SEPTEMBER, 1880.

A general assignee for the benefit of creditors has no right to make a conveyance of property until he has filed the bond required by Laws of 1860 (Chap. 348, Sec. 3); such a conveyance is void and may be set aside by creditors and by a successor of the assignee..

WOODWORTH et al. v. SEYMOUR. SAME v. DOUGLASS et al.

THESE were two actions brought to recover personal property formerly owned by William J. Allen and Charles D. Uhl, assignors for the benefit of creditors. The appeal in *Woodworth v. Seymour* was from a judgment in favor of plaintiffs on a verdict; *Woodworth v. Douglass* came before the Appellate Court on a denial of a motion for a new trial, upon a case and exceptions ordered to be heard in the first instance at General Term. Further facts appear in the opinion.

LEARNED, J.—In the second case a question is made which does not arise on the first, that is, whether a previous action between the parties was a bar to the action. In that previous action these plaintiffs sued the defendants Douglass in Justice's Court to recover certain wheels. The action was appealed to the County Court, and, on a trial there, the defendants had a verdict, and judgment was entered thereon. Afterward the plaintiffs commenced this action in this court for the same wheels. It appears that among other defenses set up in the answer in that former action, was the defense that the defend-

Woodworth et al. v. Seymour et al.

ants had a lien on the wheels for work and labor thereon. And the charge of the county judge was given in evidence to show that the question of the existence of such a mechanic's lien was submitted to the jury, and, indeed, to show that it was the only question. (*Doty v. Brown*, 4 N. Y., 71.) That charge shows that the county judge took from the jury the question of ownership, deciding that in favor of the plaintiffs. But whether or not the charge was properly admitted, the record itself only showed that some one of the several defenses had been adjudicated in favor of the defendants, not that all of them had been so decided. We think, therefore, that the former judgment was no bar to this action.

The other question, presented in both cases, respects the title to the property. Allen & Uhl, the original owners of the property, made a general assignment for the benefit of creditors, without preferences, November 29, 1876, to Nathaniel A. Ayres. On February 20, 1877, Ayres, and Allen & Uhl conveyed the same property to the plaintiffs. This, therefore, shows a good title *prima facie*. The objections made are several:

First, It appears that Ayres never filed a bond or made schedules. But that does not prevent the assignment from vesting in him. (*Brennan v. Wilson*, 71 N. Y., 502.)

Again, Allen & Uhl, on December 2, 1876, made another general assignment, without preferences, dated back to November 29, 1876, to Ayres and the defendant in the first action. And it appears that after this assignment, both Ayres and the defendant acted as assignees.

Subsequently, on February 6, 1877, Allen & Uhl were adjudged bankrupts, and afterward, on February 14th, a proposition for composition, under Section 5103 (U. S. S. R.), of the Bankrupt Act, was made by the plaintiffs, by which they offered to guaranty thirty cents on the dollar to the creditors of Allen & Uhl. Many of the creditors accepted this offer, voluntarily, among them the firm of Pratt & Seymour, of which the defendant Seymour was a member. The defendant himself signed their name. But as all of the creditors did not accept,

Woodworth et al. v. Seymour et al.

a meeting of the creditors was called and held under Section 17 of the Bankruptcy Amendment Act, November 17, 1877, and their resolution, accepting the composition, was recorded in the Court, August 13, 1878.

It was for the purpose of carrying out this proposed compromise that Ayres, and Allen & Uhl conveyed the property to the plaintiffs as above stated; and such conveyance was the consideration of their agreement to secure the thirty per cent. to the creditors of Allen & Uhl.

On May 28, 1877, and after the conveyance aforesaid to the plaintiffs, the defendant in the first action, as assignee of Allen & Uhl, filed his individual bond with sureties for the faithful discharge of his duty as assignee. The learned justice held, in the first case, that the plaintiffs were entitled to recover from the defendant the property or avails which he had received in his alleged character of assignee, less the proper expenditures. When the property was demanded by the plaintiffs of the defendant, he made no objection to their title, but said that he was ready to give up the property, if they would pay his expenses and give him a bond of indemnity.

The subsequent assignment to Ayres and the defendant Seymour did not change the title to the property. That remained in Ayres. When the debts were paid it would revert to Allen & Uhl; and therefore they properly joined in the conveyance to the plaintiffs. Nor did the bankruptcy proceedings affect the assignment to Ayres. (*Haas v. O'Brien*, 66 N. Y., 597.) The only question, then, is this; whether the failure of Ayres to file a bond affects a conveyance made by him, so far as these defendants are concerned. The object of the provision of Section 3, Chapter 348, Laws of 1860, is the protection of the creditors. As to them Ayres would be responsible for conveying the property before the execution of a bond. (*Julian v. Rathbone*, 39 N. Y., 375.) This was the view taken by the Court below in the second case. But the language of the Court of Appeals in *Brennan v. Wilson* goes much further. It says, that the act of selling by an assignee before execution of a bond is a nullity, and may be questioned by the trustees who succeed him,

Carr et al. v. Breese et al.

as well as by the *cestuis que trust*. We are reluctantly compelled to follow this decision. The justice of these present cases is with the plaintiffs, and if it were not for the decision above referred to, we should have seen no error in the result. We should have said, as was said by the learned justice who tried the second case, that "the transfer of Ayres to these plaintiffs, though invalid as against creditors, vested a title in the plaintiffs." But if the act be a nullity, as held in that decision, of course, it conveyed nothing. Nor can we say that the trusts of the assignment had been fulfilled, and therefore the property had become re-vested in Allen & Uhl. For there is no evidence in either case that all their debts had been paid, and in the first case there was affirmative evidence offered that debts remained unpaid. Nor is it proved that the debts have been discharged by bankruptcy proceedings. The composition proceedings do not affect secured debts (Rev. St. of U. S., 5103 A), nor does the resolution of the creditors bind those whose names do not appear. (Same Section.) Thus it cannot be held, on the facts as they now appear, that the trusts of the assignment to Ayres had been ended by the discharge of all debts.

For the reason, therefore, that the decision above cited holds that the transfer of Ayres was a nullity and not merely an act void as against creditors, we must reverse the judgment in the first and grant new trials in both cases, costs to abide the event.

NEW YORK COURT OF APPEALS.

SEPTEMBER, 1880.

One B., when in prosperous circumstances, purchased a house and lot, the conveyance being taken in his wife's name, and afterwards paid all his debts, and continued prosperous and in good credit in his business for three years thereafter. It did not appear that his subsequent inability to pay his debts could reasonably have been within his knowledge at the time of the conveyance. *Held*, That these facts were sufficient to rebut the presumption of fraud arising from a want of consideration for the conveyance, and that the conveyance was valid as against subsequent

Carr et al. v. Breese et al.

creditors. B. retained about half his property after deducting the amount transferred to his wife. *Held*, That the settlement was not unreasonable nor utterly disproportionate to his means.

DAVID CARR et al. v. ELLEN BREESE et al.

R. A. Parmenter, for appellants.

Esek. Cowen, for respondents.

MILLER, J.—The finding of the referee, to the effect that the defendant, William H. Breese, procured the title of the real estate which is the subject of this action, with the intent to procure goods on credit, and for the purpose of securing the property for the benefit of himself and family in event of losses in business, and to prevent his creditors from collecting their demands out of said property, and that, therefore, the transaction was fraudulent and void, is not, we think, sufficiently sustained by the evidence. From a careful perusal of the evidence, it is quite obvious that the husband had no intention fraudulently to save his property by placing it in the name of his wife, at the expense of his creditors, in case of misfortune. While his object was, in the days of his prosperity, to make provision for his wife (as he had a perfect right to do within well settled rules), we cannot resist the conclusion that he had no fraudulent or unlawful intention in contemplation. The husband is authorized to make a settlement for a suitable amount upon his wife from his property, if he has no dishonest purpose in view, and such settlement the law will protect.

At the time when the title of the property was conveyed to his wife, the husband was in prosperous circumstances, and was financially unembarrassed. He owned valuable real estate, which sold for seventeen thousand two hundred dollars, and was possessed of personal property of not a very productive character, which was worth between four thousand and five thousand dollars more. He purchased the property in question for the sum of sixteen thousand three hundred dollars, and procured the deed to be executed in the name of his wife, and he paid to the extent of ten thousand six hundred dollars, from moneys which he first obtained by mortgaging his other real

Carr et al. v. Breese et al.

estate and a subsequent sale of the same, leaving the balance on mortgage upon the property conveyed. He at that time owed not to exceed two thousand seven hundred and eighty-eight dollars and eighteen cents.

He used the balance of the moneys realized from real estate sold by him, in stock and fixtures for a new saloon he had hired, in his business, and in the purchase of some lots in Lansingburg.

He afterward paid in full every debt which he had contracted before the title of the property was vested in his wife. The purchase of the house and lot was made openly and without any concealment, the deed thereof immediately placed on record, and there was no prospect or probability of financial disaster, and it is not manifest that his subsequent embarrassment and final insolvency were contemplated or expected when the conveyance was made to his wife. For three years he continued prosperous, in good credit and standing financially, in the pursuit of the same business in which he had previously been engaged, and without having incurred any extraordinary or unusual risks. He engaged in no speculation except the purchase of the Lansingburg lots, in which he disposed of some personal property, which was unproductive, at a large price, and these lots, upon a forced sale upon execution, brought nearly within one-fifth of the purchase price. Reverses came unexpectedly while in the pursuit of his ordinary business, without any intention on his part to defraud his creditors; and it may be said, without any fault on his part except a want of human foresight, that he became embarrassed and insolvent.

It is not apparent that Breese had in view, at the time of the execution of the deed to his wife, any such result, or that he in any way contributed to produce the result which followed, for the purpose of defrauding his creditors and enjoying the advantages to be derived from the provision made for his wife. Under such circumstances the presumption of any fraudulent intent is rebutted, and it is manifest that he had done no more than any business man has a right to do, and to

Carr et al. v. Breese et al.

provide against future misfortune when he is abundantly able to do so.

The debt of the plaintiffs which is sought to be enforced in this action was incurred more than three years after the conveyance had been made to the wife and placed on record, and hence the plaintiffs do not stand in the same position as if they were antecedent creditors as of that time. Nor can it be said, in view of the evidence presented, that there was a fraudulent design by Breese to continue to obtain credit by his apparent responsibility, after the legal title had been transferred, placing the property beyond the reach of his creditors. Although a voluntary conveyance of this character is presumed to be fraudulent, as against creditors, at the time of the person paying the consideration money, where the fraudulent intent is not disproved (1 R. S. (Edm. ed.), 677, Sections 51, 52), the proof of the circumstances of his business, its risks and contingencies, his obligations, and resources, and means of meeting them, and that he neither was insolvent nor contemplated insolvency, and that an inability to meet his obligations could not reasonably have been within his contemplation, is sufficient to rebut the presumption of fraud arising from the fact that the conveyance was without a valuable consideration. (*Dunlap v. Hawkins*, 59 N. Y., 342; *Jencks v. Alexander*, 11 Pa., 623.)

The decisions which are relied upon to sustain the position, that the conveyance to the wife was fraudulent and void as to subsequent creditors, are, we think, distinguishable from the case at bar, and do not go to the extent which is claimed by the respondents' counsel, as will be seen by a reference to the cases. In *Savage v. Murphy* (34 N. Y., 508), it appears that the grantor was largely indebted when the conveyances of the real estate and the assignment of the lease was made to the wife and children of the defendant, which evidently constituted all his property, for credit obtained in his business; that he made purchases three days previously for a comparatively large sum, and failed in less than one year.

There was quite sufficient to show a fraudulent intent, and the case is not analogous to the one at bar. In *Case v. Phelps*

Carr et al. v. Breese et al.

(39 N. Y., 164), the grantor conveyed to his wife certain real estate, through the medium of a third person, in 1854. Phelps was about to engage in a new and hazardous business, and he made the conveyance evidently to provide against disaster. The deed to the third person was not put on record, but kept secret until 1860, and the deed from the third person to the wife was recorded some six months after the conveyance. The transfer was evidently made in reference to the risks to be incurred in the new business in which the grantor was about to engage, and to protect the property against losses which might be incurred thereby.

The decision is placed upon the ground that the act was done for the very purpose of preventing future creditors from collecting demands, and of casting upon them the hazard of such business. In the case at bar, although the business of Breese was extended, there was no such intention, and he continued in the same beaten track, in pursuit of the same object, without adding in any way to the ordinary risks of the same.

He entered upon no new field of enterprise for himself, or risks for his creditors, and there was no suppression of the conveyance to his wife, or attempt at concealment. There was, in fact, an absence of all proof of an intent to defraud or a design to impose upon his creditors. It is also an important fact that, in the case last cited, Phelps had parted with all his property, while, in the case at bar, he had reserved a considerable portion of it, which was afterward used in his business.

In *Carpenter v. Roe* (10 N. Y., 227), the debt had been incurred at the time of the conveyance, the grantor was largely in debt, and fifty days subsequently hopelessly insolvent. At the time of the conveyance it was not denied that to pay his indebtedness all his property would be required.

It will be seen that the facts were entirely different from those presented in the case at bar, where the grantor was indebted to a very trifling amount, and had abundant means left to pay his debts and to conduct the business in which he was then engaged. In *Shand v. Hanley* (71 N. Y., 319), it appears there was testimony which tended to show that the debtor

Carr et al. v. Breese et al.

bought goods of the plaintiff with the preconceived purpose not to pay for them; that the transfer of the real estate was made with the purpose of screening it from the debt thus created, and the deed was a part of the same plan, and all the parties were conspiring to carry out the same fraudulent purpose. A clear case of fraud was thus made out, which bears no analogy to the case at bar.

In *Mullen v. Wilson* (44 Penn., 413), it was held that a conveyance from the husband to his wife, to secure the real estate to her free from debts which he might contract in a new business in which he was about to engage, was void and of no effect as against subsequent creditors—a principle which is beyond dispute, and which is not involved in the case now considered, as the evidence does not establish any such state of facts.

A review of the cases cited evinces that none of them have any application to the case presented, where there is no evidence whatever to show a fraudulent purpose, and a considerable amount of property, amply sufficient to meet present debts and future liabilities incurred in the prosecution of the business in which Breese was engaged, was retained for that purpose. There was no insolvency in fact or in contemplation, no new enterprise started which involved unusual or extraordinary hazard, but the continuance of the business of the grantor for the period of three years, and no dishonest failure or attempt in any form to defraud. An existing indebtedness alone does not render a voluntary conveyance absolutely fraudulent and void as against creditors, unless there is an intent to defraud. (*Van Wyck v. Seward*, 6 Pai., 62.) This is especially the case when it is shown that the residue of the property was amply sufficient to pay all debts. (*Jackson v. Post*, 15 Wend., 588; *Phillips v. Wooster*, 36 N. Y., 412; *Bank of U. S. v. Housman*, 6 Pai., 526; *Dunlap v. Hawkins*, *supra*.) In the case last cited, the conveyance for the benefit of the wife was upheld; and Allen, J., who delivered the opinion of the court, refers to some of the leading features which characterize this case, and says: "By proving the pecuniary circumstances of

Carr et al. v. Breese et al.

the grantor—or him who pays for and procures a grant from others—his business, and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent nor contemplating insolvency, and that an inability to meet his obligations was not and could not reasonably be supposed to have been in the mind of the party, is the only way in which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled and overcome, except as the party making or procuring the grant may, if alive, testify to the absence of all intent to hinder, delay, or defraud creditors.”

The counsel for the plaintiffs insists that the settlement upon Breese's wife was unsuitable and disproportionate to his means, and the referee found, substantially, in accordance with this view. According to the findings of the referee, he retained about one-half in value of his entire property, which was not unreasonable or utterly disproportionate to his means. See *Babcock v. Eckler* (24 N. Y., 623), where the disproportion was far greater, and the conveyance was upheld; see also *Carpenter v. Roe* (*supra*), where Judge Gardiner, citing from 11 Wheat., 199, says: “If it can be shown that the grantor was in prosperous circumstances and unembarrassed, and that the gift was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor, the presumptive evidence of fraud would be met and repelled.”

Tested by this rule, the conveyance, although voluntary, was not fraudulent, and the circumstances presented repelled every presumption of fraud.

The fact that the deed was promptly recorded after its execution ordinarily would be regarded as sufficient notice to creditors to put them on inquiry as to the ownership of the property; and the fact that the plaintiffs knew that Breese had the title to the other real estate, which he held when they gave him credit previously, and were not informed of the purchase

Seymour et al., Assignees, v. Dunham.

of the new house in the name of his wife, does not change the general rule where there is no evidence of a fraudulent intent.

As there was no proof of a fraudulent intent, the defendant was not required, I think, to give notice to the plaintiffs of the provision he had made for the benefit of his wife. It is, therefore, unnecessary to consider the question whether notice was actually given.

In view of the facts, we are of the opinion that Mr. Breese had a right to make a provision for his wife, and the conveyance should be sustained, although it was voluntary and without consideration within well settled rules.

It follows that the referee was wrong, and the judgment must be reversed.

It was also erroneous to allow the witness Blanchard to state that, from the conversation which he had with Mr. Breese, he understood that the Fifth street property was bought and owned by Mr. Breese.

Judgment reversed, and new trial granted, with costs to abide the event.

All concur.

NEW YORK SUPREME COURT.—GENERAL TERM, THIRD
DEPARTMENT.

JANUARY, 1881.

In insolvency proceedings a debt payable on demand due a creditor may be set off against a past-due claim due the insolvent.

*HENRY A. SEYMOUR et al., Assignees of PRATT, v.
NELSON DUNHAM.*

THIS was a submission on facts which appear in the opinion.

D. L. Maxfield, for plaintiffs.

M. D. Edmister, for defendant.

LEARNED, J.—Pratt, a private banker, held a note of Dunham which was past due. Afterward Dunham made a de-

Seymour et al., Assignees, v. Dunham.

posit with Pratt of six hundred dollars, and took a certificate therefor, the deposit being payable on the return of the certificate. Subsequently, Pratt, being still the holder of Dunham's past due note, and having still Dunham's money on deposit, made a general assignment to plaintiffs for the benefit of creditors under the general assignment act. The question is whether Dunham's deposit should be set off against his note.

The argument for the plaintiffs is that such a deposit is not due until demand, that, as no demand had been made before the assignment, the deposit was not then due; while the note was due, and therefore that the deposit is not a set off.

There is no doubt of the general principle that an action cannot be maintained for moneys thus deposited until after demand. And the reason for this is, that a right of action does not arise until there has been a breach of the contract. And in cases of such a deposit, a breach of the contract does not take place until a refusal of payment.

But the plaintiffs, as I think, err in arguing that because a demand is necessary before action can be brought, therefore the indebtedness is not *presently* payable. The depository may lawfully pay the debt at any time. He could not do this if it were a debt payable in the future. The depositor may lawfully demand the debt at any time. He could not do this if it were a debt payable in the future.

A debt payable in the future is one which neither the debtor has a right to pay, nor the creditor has a right to demand, *instantly*. That is not the case with such a deposit. There is no future day till which the respective rights of the parties are postponed. The creditor may demand payment at any time, and therefore the deposit is a debt payable *in presenti*.

Let us suppose that Pratt instead of making an assignment had sued Dunham on the past due note. Can it be doubted that Dunham might have set off in such an action the deposit, producing and surrendering the certificate? Could Pratt have objected in opposition to such a set-off that Dunham had not

Seymour et al., Assignees, v. Dunham.

made a demand for the deposited money before the day when Pratt commenced his action? The reply to such an objection would have been that a demand was only for the depositary's protection, when called upon to pay, but that no demand was needed when the deposit was to be used only as a set off or defence.

In *Jordan v. Nat. S. & L. Bk.* (74 N. Y., 467), the notes on which the defendant claimed to apply the deposit were not payable at the death of the intestate. But it is remarked in the opinion that, after the paper fell due, unless other rights have intervened, the bank may hold the balance of deposits and apply it on the paper. This confirms what is above shown, that deposits are debts payable *in presenti*, although a demand is necessary before action brought.¹ Of course it is not meant that Pratt could have safely applied this deposit to the overdue note, because he had given the certificate, and therefore he could not know that other rights had not intervened by the assignment of the certificate.

The remark is cited only to show that deposits are not debts payable *in futuro*, within the meaning of the matter now under consideration.

But again, aside from the Statute, equity requires that the deposit should be applied on the notes. (*Lindsay v. Jackson*, 2 Paige, 581.) The banker has become insolvent and made an assignment. This shows that no demand of the deposit is needed for his protection. He owed Dunham, and justice requires that the mutual credits should be adjusted, one against the other. This principle is recognized. (*Smith v. Felton*, 43 N. Y., 419). The plaintiffs were assignees of Rich, a private banker, and as such had come into possession of a note of the defendants which had been discounted by Rich. The defendants at the time of Rich's failure had on deposit with him more than enough to meet the note. The note was not due at the time of the failure, and was made by one defendant to the order of the other; while the deposit was to the credit of defendants' firm. It is true that, in that case, it appears that on the day the bank was closed the defendant applied to the

Hawks, Assignee, v. Pretzlaff.

teller, and said that they wanted to draw out their deposits, and then that they wanted to apply them on the note. But the decision is placed on "the equitable rule, requiring cross-demands to be set off against each other, if, from the nature of the claim or the situation of the parties, justice cannot otherwise be done." The only reason why this act of the defendants was important, was that their note was not yet payable, and therefore it was for them to elect to apply the deposit to a debt payable in the future. If, as in the present case, their note had been past due, no request to apply the deposit to it would have been of any consequence. "Technical objections which would be valid at law will not avail to defeat an equitable set off."

Judgment should be rendered for the defendant with costs.

BOARDMAN, J., concurred; BOCKES, J., dissented.

SUPREME COURT—WISCONSIN.

NOVEMBER, 1880.

An assignee for the benefit of creditors, being a representative only of the assignor, cannot acquire a right of action which his assignor could not have had.

A bill of sale intended as a chattel mortgage, binding on the parties, is valid as against the assignee.

ELI HAWKS, Assignee of WILLIAM A. HOGG, Appellant, v. JOHN PRETZLAFF, Respondent.

ORTON, J.—The appellant predicates his right to the property in controversy upon a common law assignment, executed by one William A. Hogg to him, February 6, 1880, for the benefit of creditors. The respondent claims it by virtue of a bill of sale, absolute in its terms, executed to him by said Hogg, May 7, 1879, but which was intended to operate as a chattel mortgage to secure certain indebtedness of said Hogg to him, a considerable portion of which remains due and un-

Hawks, Assignee, v. Pretzlaff.

paid. The property remained in the possession of Hogg until the appellant took possession of it at the date of the assignment, and on February 14, 1880, the respondent took possession of it by virtue of said bill of sale.

It is conceded that the bill of sale was never filed in the proper office, where as a chattel mortgage it should have been filed according to the statute, and whether it should have been so filed, for the purposes of this case, it need not be decided. It will be assumed that, if intended as a chattel mortgage, and the property remained in the possession of Hogg the vendor or mortgagee, it comes within the statute requiring the filing of chattel mortgages. The only question, therefore, is, whether this bill of sale, not having been filed and considered as in effect a chattel mortgage, is valid as against the claim of the appellant as such assignee.

There is considerable conflict of authorities upon this question, which has no doubt arisen to some extent from the difference in the statutes of various States relating to chattel mortgages, assignments and trusts. The learned counsel on both sides have, with great ability and research, reviewed most of these authorities, in order to educe the doctrine supported by the better authority. It would be but respectful to the learned counsel if we should undertake to follow this investigation and pass upon the question as an original one in this court. But we deem it especially proper in this case to say, that when the precise point in controversy has been once decided by this court, in a case where it has properly arisen, and such decision has not been overruled by this court, it will be treated as settled in future cases, except when, conceding the decision, this court is asked or deems it proper to review or overrule it.

And even then it should not be disturbed, after it has long stood at rest as an established principle of law affecting the rights of property which have for a long time been adjusted in accordance with it, without the most cogent reasons. Affirmatively and *prima facie* at least it will stand as the law of all cases, and require no authorities of decisions elsewhere to support it. One of the learned counsel did not even allude to

Hawks, Assignee, v. Pretzlaff.

any decision of this court of the question, and the other one alluded to it only incidentally as a makeweight in the preponderance of authorities.

As we view the effect of the decision in *Estebrook and another v. Messersmith, impl'd* (18 Wis., 551), it is direct and positive authority upon this point. So viewing it, it would tend to weaken and underrate the authority of former decisions of the court, at this time, to examine the question as an original one, and the authorities elsewhere upon it. The language of this court in that case upon this point is clear, unambiguous, and unequivocal. "The assignor having himself no property in the goods which he had fraudulently transferred, could pass none to his assignee." To support this principle, the language of Lord Tenterden, in *Jones v. Yates* (9 Barn. & Cress., 532), is cited by Chief Justice Dixon, as follows, "That with the exception of a compulsory assignment under the bankrupt law, which stands upon peculiar grounds, he knew of no instance, and none had been mentioned at the bar, where the representatives could sue where the party represented could not." In addition to this unquestionable authority that a voluntary assignee is the *representative* of the assignor alone, in respect to the title of the property assigned, the learned Chief Justice predicates the decision upon this reason alone, "The transfer from Roger Bromley to his assignees being voluntary, he could not give them the right of action *when none existed in himself*, and that remained, as before, in his creditors."

It is too clear to need authority, that in this case the assignor, Hogg, could not himself question the validity of his transfer of the property to the respondent. Then it follows that his voluntary assignee, the appellant, cannot do so. The relations of a voluntary assignee to the property assigned are exclusively representative of the assignor, and not at all of his creditors, and such assignee can only avoid a previous transfer of the property by the assignor where the assignor can do so himself and for the same causes. This is clearly the effect of the above decision, if it have any effect whatever.

The only remaining question is whether this court has in

Coiné, Assignee, &c., v. Weaver.

other cases—as intimated by the learned counsel for the appellant—established in principle a different doctrine.

A brief reference to the cases cited in support of this intimation will be sufficient to show that they can have no such construction. In *Nichols v. Kribs and others* (10 Wis., 76) it is held, that an assignee of the judgment defendant is entitled to make the objection to a judgment by confession against the assignor that no sufficient statement of the cause of action had been made.

In *Thompson v. Hintgen* (11 Wis., 112) it is held that the judgment creditors of the defendant in the judgment by confession could make the same objection. In *Reiley v. Johnson, Ex'r, and another* (22 Wis., 279) the defendant to a judgment by confession brought suit in equity to vacate the judgment and the levy of an execution upon the same, and to enjoin sale of the property taken under the execution, on the ground of insufficiency of a statement of the facts constituting the defendant's liability. The decision of this court, adverse to the relief asked, was rendered upon the grounds that the plaintiff did not positively show that such statement was insufficient, or the particulars in which it was not sufficient, and that there was a sufficient amount due to justify the levy shown, and that no equities were shown. This is all that the court pretended in that case to decide.

There are, perhaps, some expressions in the opinion which appear to be in conflict with the decision in *Thompson v. Hintgen* (*supra*), but they form no part of the decision in the case, and the above cases were not alluded to in the opinion.

The judgment of the county court is affirmed, with costs.

COURT OF APPEALS—NEW YORK.

MARCH 1, 1881.

An assignment for creditors empowered the assignee “to collect the choses in action, with the right to compound for the said choses in action, taking a part for the whole when he shall deem it expedient.” *Held*, That this gave the assignee no unlawful or arbitrary power, and took from the creditors no just protection; that it merely gave to the assignee the discretion, which

Coiné, Assignee, &c., v. Weaver.

the law recognizes, to compromise doubtful and dangerous debts in cases where the safety and interest of the fund demands such action, and that this clause did not render the assignment void.

The assignment was made and accepted January 2d, and the assignee took immediate possession and did not employ the assignor in any capacity about the store. Defendant, as sheriff, levied on the goods January 16th. In an action for conversion, *Held*, That declarations made by the assignor at the time the levy was made were not admissible.

*JOHN COINÉ, Assignee, &c., Respondent, v. FREDER-
ICK G. WEAVER, late Sheriff, &c., Appellant.*

FINCH, J.—The plaintiff claims under a general assignment for the benefit of creditors, which the defendant insists is void on its face by reason of an unlawful authority conferred upon the assignee. The instrument contains a general grant and conveyance of all the property and choses in action of the assignor, and empowers the assignee “to sell and dispose of the said real and personal estate, and to collect the said choses in action, with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient.”

A literal and rigid construction of this language would justify the claim of the appellant that authority was given to compromise all debts due the assignor, as well those which were good for their entire amount as those which were doubtful and precarious. If we were compelled to accept this interpretation, it would be our duty to declare the instrument void, for it would be an authority to waste the fund. But we are satisfied that it is not our duty to adopt this construction. It is difficult to conceive of any fraudulent motive or purpose on the part of the assignor which would be aided by such an authority. The consequent loss would be injurious to the assignor, and in no possible respect an advantage. The waste permitted would tend only to increase the balance of uncanceled debt remaining to hamper his action after the close of the trust. As sought to be construed, it is literally an authority to waste the assets devoted by the assignor to the payment of his debts. Acted upon, it could only injure both the creditors and the assignor, and by no possibility benefit either. We should not ac-

Coiné, Assignee, &c., v. Weaver.

cept such an interpretation unless compelled by plain and inflexible provisions. Two rules should guide us to the proper result. The meaning and intention of the assignor is to be gathered from the whole instrument, and where two different constructions are possible that is to be chosen which upholds and does not destroy the instrument. (*Townsend v. Stearns*, 32 N. Y., 209; *Brainerd v. Dunning*, 30 N. Y., 211; *Campbell v. Woodworth*, 24 N. Y., 304; *Benedict v. Huntington*, 32 N. Y., 219.) It must be granted that the authority to compromise, given by the clause under consideration, relates by its terms to the choses in action generally transferred to the assignee. So far no distinction is made between the good and the doubtful assets. But the important words "where he shall deem it expedient to do so" qualify the general authority and limit it to either one or the other of two possible cases according to our choice of one or the other of two possible constructions. Those qualifying words may mean either that the assignee is at liberty to compromise any claim if he shall choose to do so, and behind his judgment nobody shall go, or that the assignee may compromise such claims as in the exercise of a sound discretion the interests of the trust require. We think the latter is the plain and proper construction. If it was necessary, in order to reach that interpretation, to be subtle and astute in our study of the language used, the quaint expression of Lord Hobart, cited with approval in *Townsend v. Stearns*, (32 N. Y., 215), would furnish our justification. A court may wrestle, if need be, with unwilling words to find the truth or preserve a right which is endangered. But any strain upon the language of the assignment is not necessary to our conclusion. We may so test the final and important phrase as to be certain of its meaning. Let us suppose that the assignee, acting under the authority we are discussing, had compromised a debt due the assignor by accepting one-half its amount, in a case where the debtor was perfectly good, and the whole sum could have been collected. Let us further suppose that on his accounting, the assignee, admitting all these facts, gave no other explanation than to plant himself upon the words of his authority, and de-

Coiné, Assignee, &c., v. Weaver.

clared that he was empowered to compromise where he deemed it expedient, and he did deem the compromise in question expedient, and, therefore, was entitled to protection. Is it to be presumed that any court would accept his construction of the authority conferred? The just and proper answer would be that he over-estimated and misconstrued his power; that while he was given a discretion, it was the discretion of a trustee, exercised in a proper case, under circumstances requiring it, and founded upon a just consideration of the needs of the fund committed to his care. The clause in question, therefore, must be held to have given to the assignee no arbitrary power to compromise where such action was neither necessary nor proper, but merely the discretion which the law recognizes to compromise doubtful and dangerous debts, in cases where the safety and interest of the fund demands such action; and that in such case only can he honestly "deem" a compromise "expedient," or be allowed to plead that authority as a protection. Thus understood, the language of the assignment is not open to the criticism bestowed upon it. It confers upon the assignee no unlawful or arbitrary power, and takes away from the creditors no just protection. It leaves the assignee liable for his negligence or misconduct if he makes a compromise where prudence or necessity do not require it, and the assignment, therefore, is not void. (*Dow v. Platner*, 16 N. Y., 562; *King v. Talbot*, 40 N. Y., 76; *Chouteau v. Suydam*, 21 N. Y., 179; *Ginther v. Richmond*, 18 Hun, 232.) In the case last cited the same question of interpretation was discussed, and a conclusion reached in accordance with the views we have expressed. The learned judge who wrote the opinion in that case very properly calls attention to the language of the Act of 1877, which permits the County Court to "authorize the assignee to compromise or compound any claim or debt belonging to the estate of the debtor," and argues that the phrase "any claim" could not be interpreted to mean that the court might authorize a compromise of a good debt due from a solvent debtor, and yet such a construction would be quite as reasonable as that sought to be put upon the similar language of the assignment.

Coine, Assignee, &c., v. Weaver.

We do not think the recent legislation relating to general assignments for the benefit of creditors affects our conclusion. (Laws of 1877, Chap. 466, Sec. 23.) Before that enactment the assignee could always apply to the court for its advice on a question of compromise. (*In re Croton Ins. Co.*, 3 Barb. Ch., 642; *Anonymous v. Gelpcke*, 5 Hun, 245.) The act of 1877 in this respect is merely cumulative, and extends to the County Court an authority in the given case necessary to the complete exercise of its jurisdiction. Nothing in the assignment, as we interpret it, in any manner conflicts with the authority conferred by this statute on the County Court.

It is further objected that the judge erred upon the trial in excluding the declarations of Doyle, the assignor. The sheriff made his first levy upon the stock of goods on January 16th. Doyle was then in the store. The assignment to plaintiff was made and accepted on the 2d day of January, and the inventory was made within two or three days thereafter. The assignee took immediate possession, and did not employ Doyle in any capacity in the store. The defendant's answer alleges that the assignee was in possession when the levy was made. On this state of facts, the defendant's counsel asked the question, "At the time you made the first levy what did Doyle say on the subject of having sold goods from the store prior to the levy?" The question was excluded and the defendant excepted. A further offer was made to prove similar declarations. They were inadmissible because made after the assignment and delivery of possession under it. (*Cuyler v. McCartney*, 40 N. Y., 221; *Tilson v. Terwilliger*, 56 N. Y., 273.) This was not a case like that in *Adams v. Davidson* (10 N. Y., 309), where an assignor continued in possession without a break, notwithstanding a real or pretended sale.

We are of opinion, therefore, that no error was committed on the trial, and the judgment must be affirmed with costs.

All concur, except RAPALLO, J., absent.

In re Rider.

SUPREME COURT—NEW YORK.

GENERAL TERM, THIRD DEPARTMENT, NOVEMBER, 1880.

An order of the County Court setting aside a sale made by an assignee for the benefit of creditors, on the ground that a better price can be obtained, is appealable to the General Term of this Court.

The County Court has no power to make such an order, the sale being made by the assignee by virtue of his power in trust, and not a judicial one.

In the Matter of the Assignment of THOMAS C. RIDER.

THIS was an appeal by the purchaser of a portion of the assigned real estate from an order of the Columbia County Court, setting aside the sale, and ordering a re-sale by the assignee.

The premises were sold by the assignee at public auction ; and it did not appear that the purchaser did not act in perfect good faith.

Cadman & Hoysradt, for the purchaser, *Ashley*, appellant.
Gerrit S. Collier, for the assignor, respondent.

BY THE COURT.—*First.* The respondent insists that this order is not appealable, and cites several cases in the Court of Appeals. But these cases do not apply. There are many orders which cannot be appealed to that court which may be appealed to this court from a Special Term. And the same is true of orders of the County Court. (Code Civ. Proc., Sec. 1,342; see Laws 1878, Chap. 318, Sec. 6, amending Laws 1877, Chap. 466.) It is true that this court will not review certain orders which rest solely in discretion and affect no rights. But the present order is not of that kind. It affects a substantial right; for it takes away the real estate of *Ashley*, the appellant, more effectively than would a judgment in ejectment. We do not doubt that the order is appealable.

Second. This is the more evident because, in our judgment, the County Court had no power to make such an order. Ju-

In re Rider.

judicial sales are such as are made by the authority of a court. Over such sales, as a general rule, the court which makes them has control. The act of the officer who makes them often requires, and probably is always subject to, the approval of the court which confers his power. But the sale made by this assignee was not a judicial sale. He sold by virtue of his power in trust; and the purchaser obtained the title of the original owner through that power. It was said, on the argument, that a court of equity exercises, over sales by trustees of express trusts, such a summary power as was exercised by the County Court in this case. We are not aware of any such power. Undoubtedly a court of equity would have jurisdiction of a regular action brought to set aside a fraudulent sale made by the trustee of an express trust in collusion with a purchaser. But that is not the present case. Here the County Court has set aside, on motion, a sale made by an assignee for the benefit of creditors, on the ground that a better price can be obtained. The County Court has, in short, exercised the power which it would have had over a judicial sale made by its officer. We see nothing in the statute (Laws 1877, Chap. 466, Sec. 25, amended by Laws 1878, Chap. 318), giving such a power. Very possibly, on the accounting of the assignee, the County Court can charge him for loss to the estate by wrong-doing in making the sale, if any such wrong-doing existed. But the purchaser has acquired a title to the land, not by the authority of the County Court, but by the power of sale in the assignment. The County Court cannot deprive him of title by any such order as was made in this case.

Third. But, passing the question of jurisdiction, the order should not have been made, even if this had been the case of a judicial sale. Some ten months had elapsed since the sale, during all which the assignor, who now applies for the order, had full knowledge of the facts. He was present at the sale, and subsequently surrendered possession to the purchaser. He is guilty of laches.

Again, there is nothing to show the purchaser did not act in perfect good faith. He has gone upon the property and has

In re Rider.

made improvements thereon, and at this length of time it might be difficult to compensate him for the injury which he would suffer by having his land taken from him and by being compelled to remove therefrom.

Again, since the sale the value of the land may have risen. This is probable, both from the making of this motion and from the increased prosperity of the country. To that increase the purchaser is entitled.

Again, the price which the assignor claims may be obtained is not a sufficient increase over the price at the former sale to justify the order. When to the purchase price we add the judgment on the premises which the purchaser was obliged to discharge; the improvements which he has put on the property; the expense of a re-sale; the costs of this motion; the expenses which will be caused to the purchaser by taking away his land at this time; the interest which he has paid on the mortgage, even if we deduct therefrom whatever profits it shall appear that he has received, we shall find that the probable benefits to be derived from a re-sale are not enough to make such a re-sale expedient, under the practice of a court of equity on this subject.

And it must further be observed, that it is for the public good that such sales as this, where no fraud is charged on the purchaser, should not be readily set aside. Men would be reluctant to bid at such a sale (especially where the property sold was a farm) if a purchase, made in good faith, might be set aside, after a year's possession and enjoyment and the expenditure of labor and money, on the ground that the farm did not sell for its full value. Men often attend such sales in the hope of making a good bargain, and they may rightfully do so when there is no fraud and the sale is conducted fairly. This hope is valuable, to induce men to attend, and thus to produce competition. And, therefore, the court should be careful to do nothing which would deter, in the future, attendance and competition at similar sales. Great benefit in the particular case must be shown, in order to justify the harm which may be done in the case of other sales.

McConnell, v. Sherwood, Sheriff, &c.

The order should be reversed, with ten dollars costs, and printing disbursements, and the motion for a re-sale denied, with ten dollars costs.

Present, LEARNED, P.J.; BOARDMAN and BOOKES, JJ.

Order reversed, with costs, and motion for re-sale denied with costs.

COURT OF APPEALS—NEW YORK.

MARCH 15, 1881.

Where, upon the face of an assignment, or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against the sheriff who seeks to enforce, by execution, a judgment against the debtor.

AARON McCONNELL, *Appellant*, v. FRANKLIN G. SHERWOOD, *Sheriff, &c., Respondent*.

M. Rumsey Miller, for appellant.

J. F. Parkhurst, for respondent.

DANFORTH, J.—Where, upon the face of an assignment, or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against a sheriff who seeks to enforce, by execution, a judgment against the debtor. This rule was applied at the Circuit and the General Term, but with different result. The trial judge held the instrument valid upon its face, and the jury found that it was made in good faith and without intention to hinder or defraud the creditors of the assignor. The General Term so construed its provisions as to imply an illegal purpose, and the correctness of this conclusion is the question here. It turns upon certain language in the habendum clause, when, after describing the property, the assignor declares the conveyance to be in trust; first, to sell and dispose of his per-

McConnell, v. Sherwood, Sheriff, &c.

sonal property and estate, and "collect the notes, accounts, and choses in action, *and the taking a part of the whole when the party of the second part*" (the assignee) "shall deem it expedient to so do;" and second, prescribes the distribution and payment of the proceeds to all the creditors of the assignor for all debts and liabilities which he may be owing, or, if insufficient for that purpose, "in proportion to their respective demands," but further declares that the assignee "may have the right to compromise with" those creditors, if in his opinion "it would be advantageous" to them and to the assignor. Upon these provisions the contention hinges.

The first provision, taken literally, means only that the assignee may receive payment by instalments or from time to time. He is to collect the notes, etc., but he may take "a part of the whole when he deems it expedient to do so." There is no direction to compromise, none to make abatement, none to give a discharge of the whole on receiving a part. It is not that a part may be taken *for* the whole, but of the whole. A debtor cannot insist on paying his debt by portions, nor is a creditor required to receive it in that manner. Nor is payment and acceptance of a part satisfaction of the debt. The clause in question confers authority to receive fractional payments, but none to give satisfaction. If there is doubt as to its meaning, it should be solved in such a manner as to uphold rather than destroy the instrument. It was construed at General Term, however, and by the respondent here, as if it conferred upon the assignee power to compromise or compound debts due the assignor by accepting part for the whole. This is not expressed, but if such is the effect it would be no stronger than the case made in *Coine v. Weaver*, decided in this court February, 1881, where to words similar to those now before us there was added an express "right to compound for the said choses in action," and yet the assignment was upheld. Therefore, the provision in question does not taint the assignment.

A different result follows from the clause permitting the assignee to compromise with the creditors of the assignor. To that must be applied the rule declared in *Grover v. Wakeman*

McConnell v. Sherwood, Sheriff, &c.

(4 Pai., 23 ; 11 Wend., 187), and adopted in many later cases, either in words or effect, as the only safe one, and which regards every assignment operating to delay creditors, for any reason not distinctly calculated to promote their interests, as contrary to the statute of frauds, and therefore void. But within that limitation a failing debtor may, however uselessly, amplify the words which transfer his estate and appropriate it to the payment of his debts ; for although he may thus excite suspicion and provoke litigation, and so bring his deed to judgment, they will not, unless inconsistent with the rights of creditors, invalidate his act ; and first, it is in favor of this instrument that it provides for a surrender of all the debtor's property and its equal division. Such is the desire of the assignor, as expressed in words : " To convey all his property for the benefit of all his creditors, without any preference or priority." These are the premises. The declaration of trust, or direction for distribution of the proceeds of this property, is in furtherance of this desire. It goes to all creditors for all debts ; and if not enough to pay in full, then *pro rata*. These are valid provisions, and if the assignor had gone no further, the object of the trust would have been carried out as one to the advantage of the beneficiaries. The debtor would have given up all that he had, to be applied without reserve to the payment of his debts. But then comes the succeeding clause, and this we cannot help seeing is a provision which at once nullifies all that has been commended. Without this it is such an instrument as is favorably regarded by a court of equity. With it the assignment comes within the principle of many cases where trusts have been "subverted as illegal" because the assignee was invested with some absolute or discretionary power beyond the direct appropriating of the assets to the payment of debts, or the assignor reserved to himself a power over the future direction of the trust fund, or an interest in it, to be taken care of for him by the assignee. If the assignment is valid, the trust to compromise is to be observed and regarded by the courts, and delay for that purpose in the disposition of the property or the distribution of the avails could be justified by

McConnell, v. Sherwood, Sheriff, &c.

the assignee, although required by a creditor to hasten the conversion of assets or pay over its avails. So, too, in negotiation for or arranging a compromise, the interest of the debtor is to be regarded and kept in view by the assignee, for it is permitted only when in his opinion such proceeding would be advantageous to the assignor. It therefore cannot be said that the assignor has devoted his property absolutely and unconditionally to the payment of his debts. If under the preceding clauses a creditor should insist that the assignor had so directed, the assignees could say there is also given an express power to compromise, *i.e.*, procure concessions from creditors before parting with the property. If all the creditors should say, We will compromise; give us the whole property, and we will discharge the debts; the assignee could say, That would not be advantageous to the assignor, and in either case could uphold his conduct by the very words of the instrument. But suppose the assignment did not contain this clause. The assignee could neither delay the execution of the assignment by an effort to compromise, nor consider the interest of the assignor in determining the time or manner of the execution of his trust. As it is, while placing his property beyond the reach of process, the assignor retains an interest to be provided for, delays its application to the payment of his debts by investing his trustee with power which requires time for its execution, and then prohibits its exercise unless it is advantageous to himself. I am inclined to construe this clause as requiring a compromise, if at all, with all the creditors, not permitting it with any one or any number less than all; but this does not meet the difficulty. There is the power to compromise; and this must be construed in the sense of compound, or to discharge the debts by paying only a part; and its accomplishment requires the consent of the creditors and the assignee; a payment of part by the assignee and a discharge upon its acceptance by the creditors. The imposition, then, of terms and conditions, and in devising these, the interest or advantage of the debtor must be considered. This is a plain departure from the power to convert, and the duty to pay over the proceeds of the property when

McConnell, v. Sherwood, Sheriff, &c.

converted, without regard to the debtor, and with no inquiry save as to the existence of the debt and its amount. It is said that this compromise cannot be made unless each creditor consents, neither can it unless the assignee consents for the assignor—that is, deems it for his advantage also. But without this there may be delay justified—an effort to make a compromise would require it—and until it had been tried, if the assignee saw fit to make the effort, the court could not require him to act under the other trusts. The legal duty of the assignee, under a valid trust, is as plain and simple as that of an officer holding an attachment or charged with the duty of enforcing judgment by execution. * However great the apparent sacrifice, and however disadvantageous to the debtor, the law permits no wish or interest of his to come between the creditor and the satisfaction of his debt, and it requires from the appointee of the debtor equal celerity and the same indifference. Here compromise, or an attempt at compromise, may precede payment, and with either is delay. It seems apparent, therefore, that the intent was to delay the payment of the debts and create a trust for the use of the assignor; and either of these intents, both by the common law and the statute (2 R. S., 135, Sec. 1; id., 137, Sec. 1), is a fraud, in face of which the assignment cannot stand.

The cases cited by the appellant's counsel, and referred to in his interesting and impressive argument, raise no doubt as to the necessity of this conclusion. *Jewett v. Woodward* (1 Ed. Ch., 195) was most insisted upon. But there the question did not arise. The assignment was not attacked, but acquiesced in, and the bill was filed against the assignees for an account and payment of the money to which the creditors were entitled under it. And *Hone v. Henriquez* (13 Wend., 240), where it was held that one who had become a party to the assignment, by a formal assent thereto, could not be heard to say that it was void; and so doubtless an assignment, however objectionable, if executed by consent of all the creditors, would be deemed valid and not void. But neither these cases, nor the reasons on which they stand, aid the plaintiff. The credi-

In re Allen et al.

tors did not consent, and one objection to the assignment is that under its provisions the assignee could delay the execution of the other trusts until he ascertained whether they would compromise. Power to compromise restrains the creditors until the attempt is made. Thus they would be hindered, and a delay in the conversion of property or the payment of debts, even for a single day, would be fatal to the assignment; and whether the delay is directed by the instrument, or justified by its provisions, or made necessary for their execution—except so far as that delay is incident to the conversion of assets and payment of debts—can make no difference. (*Nicholson v. Leavitt*, 6 N. Y., 510; *Brigham v. Tillinghast*, 13 id., 215.) This illegal delay is provided for by the clause in question.

It is also urged by the appellant that the jury found by their verdict "that the assignment was not made by the assignor with the intent or for the purpose of coercing creditors into compromising the debts he owed them." This is so; but it was after the court had held that the clause in question did not vitiate the assignment, and under a charge that it was not evidence of an attempt on the part of the assignor to coerce them. It was withdrawn from their consideration.

We think the learned trial judge erred in his construction of this clause of the assignment, and that the judgment given upon the verdict was properly reversed by the General Term. The order of that court should therefore be affirmed, and judgment absolute rendered for the defendant according to the stipulation upon which this appeal was taken.

All concur, except RAPALLO, J., absent.

SUPREME COURT—NEW YORK.

GENERAL TERM, APRIL, 1881.

The right of creditors of an insolvent estate to an accounting by the assignee for creditors cannot be diverted by the mere fact of a composition in bankruptcy, unless that right is in some way relinquished by the creditors, or shall be diverted by the order of the Court in Bankruptcy, as when a composition having been made and accepted, and the terms of the

In re Allen et al.

composition have been complied with, the Bankruptcy Court orders the property in the hands of the assignee to be surrendered to the bankrupt.

In the Matter of the Assignment of ALLEN, STRAUSS & CO.

Fanning & Williams, for creditors, appellants.

J. & Q. Van Voorhis, for assignee, respondent.

TALCOTT, P. J.—This is an appeal from an order made under Section 22 of Chapter 466 of the Laws of 1877, as amended by Chapter 318 of the Laws of 1878, entitled “An act in relation to assignments of the estates of debtors for the benefit of creditors.”

On the 15th day of August, 1877, Allen, Strauss & Co., who had been engaged in the clothing business at Rochester, made a general assignment of all their estate to W. W. Parsells for the benefit of their creditors, providing for an equal *pro rata* distribution to and among them without any preferences. Parsells accepted the trust, qualified, and entered upon the discharge of his duties under the assignment. He has received, and still holds, assets as such assignee amounting to eight thousand five hundred and twenty-eight dollars and eighty-nine cents, less expenses and commissions.

On the 21st of August, 1877, proceedings in involuntary bankruptcy were commenced against said Allen, Strauss & Co., apparently upon the ground that such assignment to Parsells was an act of bankruptcy, and they were decreed to be bankrupts by the District Court of the United States for the Northern District of New York.

Prior to the 7th of January, 1878, the said Allen, Strauss & Co. filed their petition with said District Court for the composition of their debts in the manner directed by the 17th Section of the amended Bankrupt Act, approved June 22, 1874. No assignee was ever appointed in the said bankruptcy proceedings. But the fact of the said assignment to Parsells it appears was brought to the notice of the said Court in Bankruptcy by the petitioning creditors to the County Court, in

In re Allen et al.

this case, who, as it appears, claimed in the Bankruptcy Court that the assets assigned to Parsells should be administered and applied by the said Parsells in pursuance of his trust. Parsells did not appear in the Court in Bankruptcy, and took no part in the proceedings in that court. Several meetings of the creditors were held under the said Section 17 of the amended Bankrupt Law of 1874. But no proceedings were ever taken in the Bankruptcy Court, or otherwise, to have the assignment to Parsells set aside, and the proposition of Allen, Strauss & Co. for a composition was finally accepted by the requisite number and amount in value of their creditors as prescribed in the said Section 17 of the amended Bankrupt Act. The proposition of Allen, Strauss & Co., which is not specially set forth in the papers in this case, as is inferable from statements contained in the papers, was to pay to all their creditors thirty per cent. of their debts, which proposition is inferred to have been in the language of said Section 17 of the amended act, that the composition proposed should be accepted by the creditors "in satisfaction of the debts due to them from the debtor."

The proposition having been accepted by the requisite number of the creditors in amount and value, was approved by the Court in Bankruptcy and duly recorded as provided by Section 17, and the thirty per cent. provided for in the composition was duly paid to the creditors; and the petitioning creditors in this case received and accepted the dividend of thirty per cent. offered by the said proposed composition.

Afterward certain of the creditors filed their petition in this matter, addressed to the County Court of Monroe County, alleging that Parsells had never accounted in relation to his trust, either in the Bankruptcy Court or elsewhere, and praying that a citation be issued to the said Parsells as such assignee, to show cause why he should not account for the money which came to his hands as such assignee.

On the return day of the citation to Parsells, he appeared by attorney and filed his petition, addressed to the County Court of Monroe County, setting forth the history of proceedings in

In re Allen et al.

bankruptcy, and the making and acceptance of the composition ; also setting forth a partial account, showing a balance of seven thousand nine hundred and thirty-five dollars and eighty-nine cents in his hands as such assignee, and praying that he may be authorized to release to the assignors the assets so assigned, and that his account be settled and he be discharged from his said trust. Whereupon a citation was issued to all parties interested in the assigned property as creditors or otherwise ; which citation having been duly served, the petition of creditors of Parsells came on to be heard at the same time before the said County Court, which afterward, on the 20th day of January, 1879, made an order, judgment, and decree, whereby, after reciting in substance the foregoing facts, it ordered, adjudged, and decreed that the said assignee, Parsells, be discharged from all further liability to the compounding creditors of the assignors, and that said assignee be authorized to release the assets in his hands to the said assignors.

From which order and decree of the County Court the petitioning creditors appeal to this court.

This brings up a question as to the effect of a composition in bankruptcy as provided for by the 17th Section of the amended law, which cannot be solved by the express provisions of that Section.

It is to be noticed, however, that the thing provided for is a "composition" of all the debts of a bankrupt, and it is provided that all the creditors may resolve "that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor." The creditors therefore are presumed to have accepted the composition proposed by the debtor in "satisfaction of the debts due to them from the debtors" as the act makes no provision for an acceptance of the proposition except in satisfaction of the debts.

The statute, Section 17, also contains the further provision, viz. : "Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction in money to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to

In re Allen et al.

which any such security shall have been duly surrendered and given up."

There is nothing in the case before us to show whether the Court in Bankruptcy considered and treated the assignment to Parsells as a partial security to the creditors or not, or whether in the proceedings in bankruptcy the creditors proved their debts as provided by the Bankrupt Law or not; or, if they did prove them, whether they proved for the whole face of the debt, or what deduction was made, if any, on account of the assigned property. Section 5075 of the Bankrupt Law (U. S. Rev. Stat.) provides as follows, viz.: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, *or a lien thereon for securing the payment of a debt* owing to him from the bankrupt, he shall be admitted as a creditor for only the balance of the debt after deducting the value of such property, to be ascertained, etc."

The priorities specified in that part of Section 17 above quoted are supposed to be those specially provided for in Section 5101 (U. S. Rev. Stat.), and therefore do not embrace, so far as appears, any of the debts due to the petitioning creditors in this case. But the question still remains, whether by virtue of the assignment, creating a trust for their benefit, the creditors did not have a lien upon the estate assigned to Parsells for the security of their debts *pro tanto*.

Equitable liens are supposed to be as much within the statute as legal liens, unless there is some prohibition in the State Law which renders them invalid. (*Parker v. Muggridge*, 2 Story, 334; *Fletcher v. Morey*, id., 555; *Peck v. Jenness*, 7 How., 612; *Davis, Assignee*, etc., 2 Bank. Reg., 392.) The assignment to Parsells was not void under the Laws of the State *per se*. (*Haas v. O'Brien*, 66 N. Y., 597.)

Whether it would have been held to be void in an action commenced by an assignee in bankruptcy to have it set aside, or could have been decreed to be void by any proceedings in the Bankruptcy Court, on the ground that such an assignment was in hostility to the Bankrupt Law and tended to defeat that law, because providing for the administration of the assets

In re Allen et al.

by a different agency from that prescribed by the Bankrupt Law. (See *Mayer et al. v. Hellman*, 91 U. S., 1 Otto, 496.) If a composition under the Bankrupt Law has been duly ratified, it confines the creditor to his security and discharges the debtor from liability. (*In re Lytle*, 14 Nat. Bank Reg., 457.) But it has been held in many cases that the creditor can pursue any collateral remedies for the collection of his debt. (See *Haas v. O'Brien*, 66 N. Y., 597; *Thrasher v. Bentley*, 59 N. Y., 649.)

In a proceeding before the N. Y. Common Pleas, in a case where the debtor had made a composition in bankruptcy, an assignee was, on the petition of creditors, ordered to account notwithstanding such composition, it not appearing that he had delivered the assigned estate to the assignors with the approval of the Bankruptcy Court. (In the Matter of *Herman*, 53 How. Pr., 377.)

As it does not appear whether the proposition for a composition embraced as a part of it that the security which the creditors already held by and under the assignment to Parsells should be relinquished; and it does not appear whether the petitioning creditors in proving their debts made any deduction from their face on account of any security they had by virtue of the assignment to Parsells; and especially as it does not appear whether the Bankruptcy Court in approving of the composition took into consideration the amount to be realized from the assigned property, or estimated that as a part of the thirty *per cent.* which was to be paid by the composition, and was agreed to be accepted in satisfaction; or whether the proposition for a composition provided that the security to which the creditors were equitably entitled under the assignment should be relinquished, and as it does not appear that the Bankruptcy Court has authorized Parsells to deliver back the assigned property to the assignors, we think the County Court erred in refusing the application of the petitioning creditors and releasing the assignee Parsells from his liability to account to his *cestuis que trust*, and authorizing him to deliver back to the assignors the assigned estate.

In re Finck et al.

In other words, we think the right to an accounting by the assignee cannot be diverted by the mere fact of a composition in bankruptcy, unless that right is in some way relinquished by the creditors, or shall be diverted by the order of the Court in Bankruptcy; as when a composition has been made and accepted, and the terms of the composition have been complied with, the Bankruptcy Court will order the property in the hands of the assignee in bankruptcy * to be surrendered to the bankrupt.

The order, judgment, and decree of the County Court appealed from is reversed, with costs to the appellant, to be paid out of the trust funds; and the assignee, W. W. Parsells, is ordered to account, as prayed for in the petition, in behalf of Fenno et al., creditors of Allen Strauss & Co., in the County Court, to which court the proceedings are remitted.

COURT OF COMMON PLEAS—NEW YORK.

AUGUST, 1881.

The assignment preferred F. & Co., and the assignee paid the claim without proof at the time. The referee disallowed the amount so paid in his report upon an accounting of the assignee, because F. & Co. had not proved their claim pursuant to the terms of the Assignment Act. *Held, Error.*

In the Matter of the Assignment of WILLIAM H. FINCK and HENRY HOLST to ALBERT PIESCH.

APPLICATION to overrule exceptions filed to the referee's report upon an accounting. The facts appear in the head-note and in the opinion.

VAN BRUNT, J.—This is an application to overrule the exceptions filed to the referee's report upon an accounting in the above matter. The exceptions are numerous, but it will not

* So in the opinion.

In re Finck et al.

be necessary to examine in detail but one, and that is the exception relating to the disallowance by the referee of the moneys paid to B. Fisher & Co., as a preferred creditor of the assignors, by the assignee.

None of the other exceptions are well taken.

The referee, it would appear, has fallen into an error in supposing that the case of the Matter of *Bailey* (58 Howard, 446) decides that where an assignee has made a payment upon any *bona fide* claim due by the assignors at the time of the assignment, if such claim is not proved according to the Assignment Act, the assignee cannot be allowed a credit for such payment.

In the Matter of *Bailey*, the decision simply was, that in a decree of distribution, payments should not be provided for in a decree for all the creditors named in the schedules filed by the assignors, but that the decree should provide for the payment only of such general claims as have been proved under the Assignment Act. It nowhere refers or relates to a preferred claim. The assignee, by the terms of the assignment, being called upon to pay a preferred claim, is bound to follow out the provisions of the assignment, whether it has been proved under the Assignment Act or not. The provisions of the Assignment Act relate only to those claims which are not specifically mentioned in the assignment itself, and is simply a substitute, giving the assignee a short method of massing his accounts instead of compelling him to file a bill in equity as was the practice before the passage of the act in question.

The assignee in this case, by the terms of the assignment, was required to pay the claim of B. Fisher & Co., and he paid that claim, and at the time of the advertisement for creditors to present claims B. Fisher & Co. were no longer creditors of the assignors, because they had been paid by the assignee as directed by the assignment.

Under these circumstances it is difficult to see how B. Fisher & Co. could swear at the time of the advertisement that they held any claim against the assignors, they having already

In re Shipman, Assignee.

been paid, and it is exceedingly doubtful whether, upon an accounting of this description, where the assignment directs a specific sum of money to be paid to a specific creditor, any other creditor can be allowed to attack the validity of that claim. If the claim is a fraudulent one, and they desire to prevent or avoid its payment, they cannot come in under the assignment and avoid it, but they must file their bill in equity to set aside the assignment. The referee in this case, therefore, erred in disallowing the amount paid to B. Fisher & Co. by the assignee because B. Fisher & Co. had not proved their claim pursuant to the terms of the Assignment Act.

In the final decree the assignee should be allowed the amount paid to B. Fisher & Co., and the account made up should be credited with the amount.

In all other respects the referee's report is confirmed, and the exceptions are overruled.

COMMON PLEAS—NEW YORK.

JUNE 6, 1881.

Where the members of a firm make an assignment, for the benefit of their creditors, of their individual and copartnership estate, and the individual estate of one of the copartners is more than sufficient to pay his individual indebtedness, the individual creditor has the right to claim his debt and the damages, by way of interest, which he has sustained by reason of non-payment at maturity, up to the time of the distribution.

*In re Accounting of WILLIAM D. SHIPMAN, Assignee of
DUNCAN, SHERMAN & CO.*

THE facts appear fully in the opinion.

Francis L. Stetson, for appellant.

James H. Fay, for respondents.

VAN BRUNT, J.—Mr. James H. Fay and Mr. Sidney P. Slater, as executors of the last will and testament of Edward E. Dunbar, deceased, held a bond made by William B. Dun-

In re Shipman, Assignee.

can, a member of the firm of Duncan, Sherman & Co., which, in December, 1877, was past due and unpaid.

This bond bore date on the 14th day of June, 1871, and was payable on the 14th day of June, 1872, and the amount secured to be paid was seven thousand three hundred dollars, and the interest thereon. Such interest was paid up to the 14th day of June, 1878, and a part of the principal, leaving the sum of two thousand four hundred and seventy-three dollars and thirty-four cents of principal due.

In 1875, the firm of Duncan, Sherman & Co. made an assignment, for the benefit of its creditors, of their individual and copartnership estate to William D. Shipman.

The individual estate of William B. Duncan was more than sufficient to pay his individual indebtedness, and the assignment provided that the assignee should convert the assigned estate into cash, and, after the payment of expenses, to pay and "distribute the residue of the proceeds to and among the creditors of the firm and to and among the creditors of the respective individuals constituting the firm, according to law in such case made and provided, so that each of said classes of creditors—to wit, the creditors of the said firm and the creditors of the individual members thereof—shall receive as such classes, and respectively, from that part of such proceeds of all and singular the assigned premises in which, by law, they are respectively, as classes and individuals, entitled to share, their due and ratable proportion according to law."

On the 18th of December, 1878, the said executors presented their claims to the assignee, who refused to pay anything more than the principal due upon said bond.

Upon the coming in of the assignee's accounts, after the return of the citation, the Court made a decree that the assignee should pay the principal and interest to the time of distribution, upon said bond, and from this portion of the decree or judgment this appeal is taken.

I am entirely unable to see upon what principle individual creditors of William P. Duncan can be deprived of their right to recover the whole amount of damage which they have sus-

In re Shipman, Assignee.

tained by reason of his breach of contract to pay his individual debts when due.

It is conceded that his individual estate is and was amply sufficient to meet the whole of his individual liabilities, and it is also conceded that he has placed that estate, by virtue of the assignment, out of the reach of his individual creditors, and they were prevented from collecting the same by the ordinary process of law; and it is claimed that the delay which has been caused by the act of Mr. William B. Duncan in making the assignment which he has done shall operate to the benefit of the copartnership creditors and to the detriment of the individual creditors.

The cases which have been cited from England, and also those in the State of Massachusetts, and also in the Federal Courts of this State, seem to rest upon the peculiar provisions of the bankrupt laws in force and under consideration by the Courts respectively which decided the cases cited. There is no provision of the law of the State of New York regulating this question, and by the terms of the assignment itself it would seem that the rights of individual creditors were recognized, and that the provision of the assignment seems to be that those individual creditors shall be satisfied in full before any portion of the individual estate shall be devoted to the payment of copartnership debts. All that the assignors have the right to transfer to their copartnership creditors of their individual property is the surplus that would be returned to them by the assignee after the payment of their individual debts, in case each of the partners had simply made a separate assignment of their individual estate for the benefit of their individual creditors.

Now, I do not think it could be claimed for a moment that where an individual had made an assignment of his individual property for the payment of his individual debts, believing himself to be insolvent, and it subsequently turned out that his estate was entirely solvent, but what his creditors would have the right to collect interest up to the time of distribution, and that he could not claim that they should only be paid up to

In re Shipman, Assignee.

the time of the assignment and that the excess should be returned to him.

The right of the individual to apply by means of an assignment only such part of his individual estate to the payment of copartnership debts as may remain over after the payment of his individual debts, being a transfer of that which would be returned to him in case he had made an individual assignment only, seems to show that the individual creditor has the right to claim his debts and the damages, by way of interest, which he has sustained by reason of non-payment at maturity, up to the time of distribution. The injustice of any other rule, it seems to me, is clearly manifest. The rights of the individual creditor would be delayed, and he would necessarily have to contribute to the increase of the fund which was to go to pay the copartnership creditors. There does not seem to be any equity in any such rule, and it cannot prevail unless we are compelled so to hold by some definite and controlling authority on the subject.

It is urged by the counsel for the appellant that the case of *Ex parte Murray* (6 Paige, 204) is not an authority in point. An examination of that case shows that the principle involved in the illustration which I have heretofore made use of received the entire sanction of the court in that case.

It is claimed that the decision of that case is not an authority because there was no voluntary assignment, no contract between assignor and assignee, and no express trust; that there was no question between one class of creditors and another, but it was a question only between one trustee and another, for if the surplus had returned to the corporation it would have held it in trust for the creditors; and that is precisely the condition of affairs in case of a solvent individual estate and an insolvent copartnership estate.

The assignee of the individual estate holds it in trust for the individual creditors, and the only interest which he has in the individual estate is in the surplus after the complete satisfaction of the individual debts.

In other words, as I have above said, all that the assignee

Schiele et al. v. Healy et al.

gets is that which would be returned to the individual assignor if there were no copartnership creditors.

I am of the opinion, therefore, that the order appealed from, directing the payment of the individual creditors in full with interest to the time of distribution, was entirely correct, and the order must be affirmed, with costs.

All concur.

COMMON PLEAS—NEW YORK.

MAY 6, 1881.

The insertion of a provision to pay individual debts out of partnership property in an assignment of the partnership effects of an insolvent firm is evidence of fraudulent intent on the part of the assignors so as to void such assignment.

LEWIS SCHIELE et al. v. RICHARD HEALY et al.

THE defendants Healy and Conway were partners in trade. In December, 1878, they made an assignment for the benefit of creditors to the defendant Cunningham, who was a preferred creditor for sixteen hundred and four dollars and fifty cents, made up of two promissory notes, and owing to him by the said assignors. It appeared upon the trial that both these notes were dated the same day, to the same payee, but the smaller was signed by the defendant Richard Healy individually. The plaintiffs are judgment creditors of the partnership, and filed this bill to set aside the assignment as fraudulent, and a decree to that effect was given by the court below. The defendants appeal to this court.

John J. Adams, for plaintiffs.

Alvin Burt, for defendants.

BEACH, J.—It is fair to conclude, from the evidence given upon the trial, that the note for two hundred dollars was given.

Schiele et al. v. Healy et al.

by the defendant Healy for an individual debt. Thomas J. Conway, the payee, and who transferred it to the defendant Cunningham, states directly and without qualification that the defendant Healy owed him a debt of four hundred dollars before the formation of the firm, the half of which was represented by this note, while the balance was included in the one for twelve hundred dollars signed with the firm name. Upon his cross-examination he states that Healy told him the four hundred dollars was used in his business, which in no way tends to change the obligation to a firm indebtedness, because Healy had been doing business for some time before the co-partnership of Healy & Conway was formed. Nor is the force of this evidence weakened by the testimony of defendant Conway that he was to assume one-half of the indebtedness for four hundred dollars, because that portion was included in the firm note for twelve hundred dollars, while the balance was represented by the individual obligation of Healy. This tends to establish a direct contradiction of that statement. In any event, were it true, the sum would have been a portion of the capital of the partnership, and in providing it each partner seems to have intended to contract a separate personal obligation.

The assignment was of the firm property, and the question arises whether or not it was rendered fraudulent and void by the preference of an individual indebtedness of one co-partner.

In *Kirby v. Schoonmaker* (3 Barb. Ch., 46) the case differed from the one at bar. The assignment covered both individual and partnership property, and gave preference to the creditors of the firm, except in two instances of individual indebtedness upon which the contention of its invalidity was founded. "These debts," says the learned Chancellor, "were not directed to be paid out of the partnership generally, but the separate debt of each co-partner was directed to be paid out of his portion of the proceeds of the joint property, and of his separate property. . . . The case, however, would have been entirely different if co-partners who were insolvent and

Schiele et al. v. Healy et al.

unable to pay the debts of the firm, either out of their co-partnership effects or of their individual property, had made an assignment of the property of both to pay the individual debt of one of the co-partners only. For an insolvent co-partner who was unable to pay the debts which the firm owed would be guilty of a fraud upon the joint creditors if he authorized his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property was liable at law or in equity."

The creditors of a co-partnership are legally and equitably entitled to payment from the firm assets. If, as appears by the proofs, the note for two hundred dollars was an individual debt of the defendant Healy, the provisions for its payment from the firm assets in preference to demands against the partnership was a fraud upon those creditors, and should invalidate the assignment. Neither the firm nor the other partner, Conway, was in any way liable upon the note, and its endorsement with the firm name by the maker, Healy, after, or at the time of the assignment, was a fraudulent act, showing a like intent. If the conclusion of fact is well founded, the decision of the Court of Appeals in *Wilson v. Robertson* (21 N. Y., 587), in addition to the adjudication *supra*, seems to dispose of the case. The court say that the insertion of a provision to pay individual debts out of partnership property in an assignment of the partnership effects of an insolvent firm "is a violation of the statute in respect to fraudulent conveyances, and furnishes conclusive evidence of a fraudulent intent on the part of the assignors. . . . The prior right of the creditors of the firm to its effects cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right, or hinders or delays such creditor in enforcing payment of his demand against the firm from the firm's property, is a violation of the statute and a fraud upon such creditor."

The case of *Turner v. Jaycox* (40 N. Y., 470) does not bear upon the point. The decision was based upon the fact that, although the debt preferred was not originally contracted by

Rennie, Assignee, et al. v. Bean et al.

the firm, they had subsequently, for a good consideration, agreed to and became liable to pay it.

The judgment must be affirmed, with costs.

C. P. DALY, C.J., and J. F. DALY, J., concur.

SUPREME COURT—NEW YORK.

GENERAL TERM, THIRD DEPARTMENT, JANUARY, 1881.

An assignee for the benefit of creditors orally assented to act, caused the assignment to be recorded without his assent being written thereon, and took actual possession of the property. Thereafter, but on the same day, the property was seized under an attachment. Some days later the assignee signed and acknowledged his assent to act and the assignment was again recorded. *Held*, That the first act of recording was unauthorized and void under Chap. 466, Laws of 1877, and that the attaching creditors obtained a priority of right to the property as against any claim which the assignee could interpose.

WILLIAM J. RENNIE, Assignee of ANSEL H. GAIGE, and ANSEL H. GAIGE, Plaintiffs, v. JEREMIAH BEAN et al., Defendants.

SUBMISSION of controversy, under Section 1279 of the Code of Civil Procedure. The facts appear fully in the opinion.

Solomon Judd, for the plaintiffs.

Chapman & Lyon, for the defendants.

BOCKES, J.—The assignment was executed and acknowledged by the assignor on the 18th day of September, 1877, and its acknowledgment was duly certified by a commissioner of deeds on that day. On the following day, the 19th, the assignment was handed to the assignee, who thereupon orally assented to act as assignee thereunder, and immediately delivered the instrument to the county clerk for record, and it was recorded on that day at 1.30 P.M. On the same day the assignee took actual possession of the assigned property; after

Rennie, Assignee, et al. v. Bean et al.

which, and at 2.30 P.M. of that day, the property was seized by the defendant Dunn, as sheriff, under an attachment in favor of the defendant Bean against the assignor. Five days thereafter, and on the 24th September, the assignee signed and acknowledged his assent to act as assignee. Thereupon the instrument was again recorded in the county clerk's office. The question is, when was the assignment to be deemed delivered so as to pass the title to the assigned property to the assignee? The first act of recording was unauthorized and of course goes for nothing. The statute is, that "the assent of the assignee, subscribed and acknowledged by him, shall appear in writing . . . upon the assignment before the same is recorded." (Sess. Laws of 1877, Chap. 466, Sec. 1.) These requirements were not complied with prior to the first recording of the instrument; hence, that act was without authority. The assignment did not become effectual to pass title until there was an acceptance of the trust by the assignee. This was held in *Crosby v. Hill-ger* (24 Wend., 280). It was there decided that the mere taking of the instrument in hand by the assignee, and its retention by him, amounted to nothing; that there must be an acceptance of the trust; that a delivery without acceptance was nugatory.

Formerly, delivery of the assignment to the assignee, his oral acceptance of the trust and taking possession of the assigned property, as was done in this case on the 19th of September, would have vested the title in the assignee, and neither an acknowledgment of the instrument nor its recording was necessary to its validity. But in 1860 a law was passed which provided 1. That assignments should be in writing; 2. That their execution should be acknowledged; and 3. That the certificate of acknowledgment should be indorsed thereon before delivery to the assignee. (Sess. Laws of 1860, Chap. 348, Sec. 1.) Under this statute it was held that the acknowledgment by the assignor was a condition precedent to a valid and effectual delivery. (*Fairchild v. Gwynne*, 16 Abb., 23.) This decision was by a divided court. The doctrine of this case was, however, afterward re-declared by the Court of Appeals in *Hard-*

Rennie, Assignee, et al. v. Bean et al.

man v. Bowen (39 N. Y., 196), and in *Britton v. Lorenz* (45 N. Y., 51). Thus it was held in the former of these cases that under this statute of 1860, even though the assignment were delivered together with the possession of the assigned property, yet creditors of the assignors might attach the property in the hands of the assignee prior to making the statutory acknowledgment. The present statute of 1877, Chap. 466, which we are here called upon to construe, differs from that of 1860 in this, that the former, the law of 1877, does not in terms declare that the certificate of acknowledgment must be indorsed on the instrument *before* delivery to the assignee. But in both of the cases last cited the question was discussed whether the provisions of the law declaring how assignments should be executed and delivered were merely directory or were mandatory, and it was determined that they were mandatory. It was argued that the purpose and object of the statute was to correct abuses theretofore existing in the execution and delivery of those instruments ; and it was decided, in effect, that, such being the case, an observance of the provisions of the law, declaring what should be done and the mode of doing it, was essential and was a prerequisite to their validity. On this subject Judge Mullin says, in *Fairchild v. Gwynne*, that "voluntary assignments by insolvent debtors for the benefit of creditors, in and by which certain creditors or classes of creditors have been preferred over other creditors or classes, have not been favored instruments in the courts, nor have business men looked upon them without suspicion. The secrecy with which they might be made, the facility they afforded to fraud, the unjust preferences they secured, required that they should be watched with the greatest vigilance, and scrutinized with the greatest care. It was in the power of the debtor and his assignee to put forward one of these instruments at such time as should most effectually give effect to their own purposes, to *ante* or *post* date it, to consider it as delivered or not delivered, to alter the schedules, to increase or lessen the number of preferred creditors, to prefer a friend or non-prefer an enemy, to increase or lessen the amount of property to be passed under the

Rennie, Assignee, et al. v. Bean et al.

assignment; these and other fraudulent and dishonest acts might have been done without any opportunity being afforded to the creditors to prevent or punish them. It was to prevent these abuses that the statute (Chap. 348 of 1860) was passed;” and the learned judge added, “there was an evil to be remedied, and it could only be remedied by a law requiring the persons to be affected by it to conform to its provisions or their acts would be void;” and he further adds as follows: “That the legislature intended to make this statute mandatory I have no doubt.” These remarks are introduced here at length, because of their pertinency and direct bearing upon the case in hand. The same line of reasoning is pursued by Judge Mason in *Hardman v. Bowen*, above cited. He says that it is a fundamental error to treat the statute as merely directory; that “it is no such thing; that it introduces a new law in regard to assignments.”

Then, regarding the Act of 1877, Chap. 466, Sec. 1, as mandatory, what is requisite to constitute a valid assignment for the benefit of creditors, so as to vest the property in the assignee? Those requirements are specified in Sec. 1 of that act, and for anything that appears, or for any sound reasoning that can be adduced to the contrary, each requirement should be held peremptory, one as much as the other. That section provides that assignments shall be in writing; shall be duly acknowledged by the assignor; shall be recorded in the clerk’s office; and it also provides that the assent of the assignee shall be in writing upon the instrument before it shall be recorded. According to the decisions above cited, the law is mandatory as to the first three provisions above stated. As to those the statute is peremptory. It thus declares the requisites of a valid assignment. It was competent for the legislature to establish the prerequisites, and by making it a public record before it should take effect many of the abuses which before existed would be corrected. It is a matter of importance to creditors to know whether or not an assignment has been made; whether or not, if made, it has been delivered so as to become effectual to pass the debtor’s property; also its provisions. The making

Smith et al. v. Longmire et al.

a public record of it answers all proper requisites in this regard. It is then put on an equal footing with other records which the public good requires should be open to inspection to all persons. This was doubtless what the legislature intended by this act, as in this way many of the evils which had before surrounded assignments by insolvent and, oftentimes, dishonest debtors, would be, to some extent at least, remedied.

In this case the assent of the assignee was not indorsed, and of course it was not acknowledged, nor was the instrument duly recorded until several days after the seizure of the property under the attachment. Hence, as we conclude, the attaching creditors obtained a priority of right to it, as against any claim which the assignee could interpose.

In the above consideration of the case we have not overlooked the decisions made under the law of 1860, which held some of its provisions to be merely directory. These cases have reference to duties or acts to be performed after the assignment has taken effect and the title has passed. (*Evans v. Chapin*, 20 How., 289; *Van Vleet v. Slauson*, 45 Barb., 317; *Barbour v. Everson*, 16 Abb., 366; *Thrasher v. Bentley*, 59 N. Y., 649; *Brennan v. Willson*, 71 id., 502; *Matter of Farnam*, 75 id., 187.) These cases are, as we think, here inapplicable.

The defendants are entitled to judgment, with costs. If the parties are unable to agree upon the form of the judgment to be entered, it may be settled by one of the members of the court.

LEARNED, P.J., and BOARDMAN, J., concurred.

SUPREME COURT—NEW YORK.

GENERAL TERM, FIRST DEPARTMENT, MARCH, 1881.

Property of a debtor in the hands of an assignee for the benefit of creditors cannot be attached so as to establish an enforceable lien against it.

Where an assignment has been set aside as fraudulent, intervening attaching creditors are not entitled to a reference to ascertain any questions of priority between themselves and the creditors at whose suit it was set aside.

Smith et al. v. Longmire et al.

*JOHN G. SMITH et al. v. JONATHAN LONGMIRE
et al.*

APPEAL from an order denying a motion made by William Taylor & Co., attaching creditors, for a reference to determine the priorities of the liens upon the funds in the hands of the receiver appointed by the decree in this action. The facts appear in the opinion.

William Blaikie, for Taylor & Co.

John J. Adams, for plaintiffs.

Adolph Ascher, for the receiver.

DAVIS, P. J.—The plaintiffs were judgment creditors of the defendant Longmire, and as such brought this action to set aside an assignment for the benefit of creditors made by Longmire to the defendant Pinkney. Upon the trial of the case, a decree was made setting aside the assignment as fraudulent, and appointing a receiver, and directing the assignee to turn over the property, and the proceeds thereof, to such receiver. The assignment to Pinkney was made on November 28, 1879, at or about which time Pinkney took possession of the assigned property. On the 9th of December following, Taylor & Co. commenced an action against Longmire upon an indebtedness to them, and, at the same time, issued an attachment against the property of Longmire, and on or about that day the attachment was levied by the sheriff upon the books of account, documents, papers, credits, and effects of Longmire; and a copy of the warrant, with the notice required by law, was delivered to Pinkney, the assignee of Longmire. Subsequently, the plaintiffs Smith and others recovered judgment against Longmire, and after execution returned *nulla bona*, and in March, 1880, filed their bill against Longmire and the assignee in this action, and obtained a judgment declaring said assignment fraudulent, and vacating and setting the same aside, and appointing a receiver, as before stated.

The question presented by this case is whether Taylor & Co., as attaching creditors of Longmire, acquired any lien upon,

Smith et al. v. Longmire et al.

or interest in the choses in action in the hands of the assignee of Longmire, by virtue of their attachment. There was, formerly, upon this question, much conflict of opinion in the courts, and if the question had not been authoritatively disposed of, we should have been strongly inclined to consider the able argument of the learned counsel for the appellants as satisfactorily establishing the lien of the attaching creditors. This question was before the Court of Appeals in *Thurber v. Blanck* (50 N. Y., 80), which court held, in effect, that choses of a debtor in the hands of his assignee, under an assignment for the benefit of creditors, could not be attached so as to establish an enforceable lien against the same. That decision was in direct conflict with the decision of the Commission of Appeals in *The Mechanics' and Traders' Bank v. Dakin* (51 N. Y., 519). In that case, on its second appeal (8 Hun, 431), this Court had occasion to consider which of these decisions was the controlling law, and it was held that, even in that particular case, this court was bound to consider the rule laid down in *Thurber v. Blanck* as the controlling one. The decision in *Thurber v. Blanck* was substantially reiterated in *Lynch v. Crary* (52 N. Y., 181), and is now, undoubtedly, the law of this State.

The principle upon which the rule of these authorities rests is, that by such an assignment the legal title vests in the assignee, and that the interposition of such legal title prevents the acquirement of a lien in favor of creditors by attachment or execution against the assignor, and that no lien can be created except by a judicial determination removing the obstruction, which determination can only be obtained by such creditors as are in position to assail the validity of the assignment.

With the law thus settled, we are unable to see that the appellants in this case acquired by their attachment any lien upon the choses in action which, or their proceeds, are in the hands of the receiver. Having no lien, they are not entitled to a reference to ascertain any question of priority as between themselves and the respondents.

Richmond, Assignee, etc., v. Prait, Sheriff.

The order of the court below was, therefore, right, and should be affirmed with ten dollars costs and disbursements.

BRADY, J., concurred in the result.

SUPREME COURT—NEW YORK.

GENERAL TERM, THIRD DEPARTMENT, MAY, 1881.

In a proceeding for the discharge of an imprisoned debtor from arrest under the provisions of the Revised Statutes, the question whether his schedules are just and fair is one for the County Court to determine.

The affidavit required by 2 R. S., 32, Section 5, must be endorsed and sworn to before a copy of the petition is served on the creditor and must be upon the petition when it is first presented to the court.

It is immaterial that the affidavit is annexed to instead of being endorsed upon the petition.

*ALVAN RICHMOND, Assignee, etc., Appellant, v.
HIRAM PRAIM, Sheriff, Respondent.*

APPEAL from a judgment in favor of defendant, entered on a trial by the court without a jury.

The action was brought for an escape from the jail limits of Fulton County of one Henry D. Helterline, who was imprisoned on an execution issued on a judgment recovered by this plaintiff for the conversion of personal property. The sheriff justified for the alleged escape, under an order of the Fulton County Court, made April 5, 1880, by which order the court directed the discharge of Helterline from imprisonment.

S. L. Seabrook, for the appellant.

J. M. Dudley, for the respondent.

LEARNED, P. J.—Under the decision in *Bullymore v. Cooper* (46 N. Y., 236) the order of discharge was insufficient in its recitals to protect the defendant. It is, therefore, necessary to recur to the proceedings on which the order was based, to see whether the papers presented to the County Court were sufficient to give the court jurisdiction. (See case cited, 246.)

Richmond, Assignee, etc., v. Praim, Sheriff.

The first point made by plaintiff is that the schedules are not "just and fair" which were presented to the court with his petition, in that, at the time of his arrest, he owned a watch and had a contract, and that he had disposed of the watch and of some of the proceeds of the contract at the time of the petition. But this question, viz., Whether the debtor's proceedings are just and fair? is one to be tried by the County Court. And it has been tried, and decided in favor of the debtor. Whether the acts of the debtor were or were not fraudulent was a matter for that court to investigate.

The next point is that the affidavit of the debtor speaks of the "above" petition and account instead of the "within" petition and account (2 R. S., m. p. 32, § 5). In *Hale v. Sweet* (40 N. Y., 97), cited by plaintiff, the variation in the affidavit changed its meaning materially. In this instance it does not.

The next point is that the affidavit of the debtor was not endorsed on the petition, but was annexed.

This objection was made on the offering of the petition and papers in evidence, but it does not appear from the case what the fact was. The affidavit follows the petition immediately; but it is not stated in the case that it was written on the same or on another piece of paper. The words "above petition" contained in the affidavit would be accurate, even if the affidavit were written on the back of the petition. And from those words alone we have no reason to think that the affidavit was not endorsed.

The plaintiff cites *Browne v. Bradley* (5 Abb., 141). This decides nothing on the question of endorsing or annexing the affidavit. Nor does *Bulymore v. Cooper* (2 Lans., 71), also cited by plaintiff.

No objection of this nature was taken by the plaintiff on the hearing before the county judge. We think that it does not appear that the affidavit was not endorsed; and that, if it did so appear, it would be immaterial.

Another and much more important question relates to the time when the affidavit was made. The petition was dated

Richmond, Assignee, etc., v. Prain, Sheriff.

March 18th; the affidavit was sworn to March 19th; the petition was presented to the court April 5th, and the order made that the debtor be brought before the court forthwith; and he was so brought that day. No affidavit, so far as appears, was made that day. The question is whether, under Section 5, above cited, the applicant must take the oath at the time of presenting the petition. A literal compliance with that is often impossible, because the petition is presented in court, while the applicant is, or may be, in actual custody in jail. He cannot, therefore, swear to a petition at the time of presenting it, when he may not be in presence of the court. After presenting the petition, it is true, an order is to be made that he be brought before the court. This implies that he was not there when the petition was presented. And though, for precaution, it is not uncommon to have the applicant verify the petition when he is brought in, yet it is plain that the petition must have been presented before, otherwise the order to bring him in could not be made.

This question is left carefully undecided in *Bullymore v. Cooper* (46 N. Y., 236). The Special Term case of *Browne v. Bradley* (*ut supra*) expresses an opinion that the affidavit cannot be made before the presenting. That is followed in *Bullymore v. Cooper* (2 Lans., 78). But other points were there relied upon. It is followed in *Hillyer v. Rosenberg* (11 Abb., N. S., 402, Sp. T. Com. Pleas). But the learned judge, appreciating the difficulty above mentioned, was obliged to hold that the presenting the petition was to be construed to extend to the time when the applicant was brought before the court under the order.

The statute provides only for one affidavit. A copy of the petition and schedules are to be served on the creditor with a fourteen days' notice (Sec. 3). Can it be that a copy of an unverified petition is to be served? Must not a copy of the same papers be served on the creditor which are afterwards presented to the court? Is the court to make the order to bring the applicant before it on an unverified petition? This would be entirely contrary to all practice. It will hardly be

Richmond, Assignee, etc., v. Prain, Sheriff.

doubted, therefore, that *an* affidavit must be made *before* the copy of the petition is served, and that such affidavit must be upon the petition when it is first presented. Is there anything in Section 6 which indicates that another affidavit is to be made? Nothing. A summary examination is to be made of the applicant on oath, and other proofs are to be heard. That was done in this case.

Is there, then, anything in the language of Section 5 inconsistent with this practical view? It says that, at the time of presenting the petition, the following affidavit shall be endorsed thereon, and sworn to by the applicant. Does that mean that the endorsing of the affidavit must be done in the presence of the court? Certainly not. The meaning is that, at the time of presenting the petition, it shall have upon it, sworn to by the applicant, the affidavit required. There would have been no difficulty in expressing the meaning claimed by the plaintiff. The statute might have said: at the time of presenting the petition, the applicant shall endorse and swear to the following affidavit. Or the language of 2 Revised Statutes (m. p. 28), Section 2, might have been used, or that of 2 Revised Statutes (m. p. 17), Section 7. In those cases the language shows that the applicant is to make the affidavit before the officer, and for the very obvious reason that, in those cases, no previous service of a copy of the petition on creditors is necessary.

And it should be noticed here that the position taken by the plaintiff originated in the remark made by the Special Term in *Browne v. Bradley*, which was not necessary to the decision of the case. Nor has there been any case decided which necessarily involved the point under discussion. Again: the attorney for the creditor was present when the applicant was brought into court, and made certain preliminary objections. This was not one of them.

It is further urged by plaintiff that the sheriff did not formally discharge the debtor, and that the order of discharge was not served on him. But if it was actually granted, and was valid, the sheriff cannot be held liable for obeying it, although he was not formally served. He may not be obliged

Durr et al. v. Kelly et al.

to obey, but he is not to be punished for obeying a valid order before service.

The judgment should be affirmed, with costs.

BOOKES and BOARDMAN, JJ., concurred.

SUPREME COURT—ALABAMA.

JUNE, 1881.

1. A sale of his property by a debtor who is insolvent, or in failing circumstances, with the intent thereby to put it beyond the reach of his creditors, or to hinder, delay, or defraud them, will pass a good title to the purchaser, paying full consideration, *unless* he had knowledge of the fraudulent intent or was possessed of information which was calculated to put him on inquiry, and which, if followed up, would have led to the discovery of the fraudulent intent; but if the purchaser has such knowledge, or means of acquiring it, the payment of full value for the property is not sufficient to protect him.
2. If the intention or purpose of the debtor making the sale, he being insolvent or embarrassed, is to give a preference among his creditors, at his election, in the subsequent use of the proceeds of sale, this is fraudulent as against creditors, particularly if the sale is on credit; and the same rule applies as to the participation of the purchaser in the fraud.
3. If the debtor's intent was to delay his creditors until the maturity of the purchaser's notes for the price, the case is within the terms of the statute, and the sale is fraudulent as to his creditors, although made "to prevent a sacrifice of his property by such under execution, and to get the value of it for the purpose of paying it to his creditors."
4. It is not necessary that the fraudulent intent should extend to all the creditors: if the intent be to hinder, delay, or defraud one or more of them, it is within the statute; and the fact that the sale was open and notorious, and the payment of a full and fair price, are immaterial considerations.
5. In a civil action, to establish any proposition for either party, it is only necessary that the evidence should produce a reasonable conviction in the minds of the jury: a charge asked, requiring a fact to be "clearly" proved, is properly refused.
6. If the purchaser of goods from an insolvent debtor intentionally intermingles them with his own goods, and refuses to furnish the sheriff, seeking to levy an execution on them, as the property of the vendor, the information necessary to distinguish them, he cannot claim any advantage from the confusion of goods; and having interposed a claim under the statute to the goods levied on, the duty is cast on him to furnish the proof necessary to separate the goods.

LEHMAN DURR & CO. v. KELLY & BROTHER.

THE plaintiffs requested the court to charge the jury in writing as follows, to wit:

- 1st. That if the jury believed from the evidence that W.

Durr et al. v. Kelly et al.

intended, by the sale of the goods, to *hinder, delay, or defraud* the plaintiffs or other creditors of the defendants, in the collection of their claims against him, and the claimants knew of, or had information of W.'s purpose, they must find for the plaintiffs. (Given.)

3d. That if the jury believe from the evidence that the execution in favor of plaintiffs was levied upon goods which belonged to the defendant W., while the debt of the plaintiffs was subsisting, and up to the 3d day of March, 1876, said goods were in his possession as owner; and that on that day the defendant W., *for the purpose or with the intent to hinder, delay, or defraud the plaintiffs or any other of his creditors of their lawful suit, damages, forfeitures, debts, or demands*, sold the goods to Kelly & Brother, the claimants; and if the jury further believe from the evidence that the claimants, or either of them, at or before the time they made their purchase of the goods, said that W. "was broke," and they knew that he was financially embarrassed, or insolvent, and was being pressed by his creditors, and that some of them were suing him in the courts, and that while the negotiations for the sale of the goods were going on, the defendant said to either of the claimants that before he would take less than a certain price (named by him) for the goods, he would let the sheriff sell them; then it was the duty of the claimants to have informed themselves by such inquiries as were reasonably accessible to them, of the financial condition of said W., and his object and purpose in selling, or offering to sell, said goods before they purchased the same; and if by such inquiries they could have obtained information sufficient to have satisfied the mind of a reasonable and discreet man, that W. did intend by the proposed sale of said goods, either to *hinder, delay, or defraud* the plaintiffs, or any of his then existing creditors, in the collection of their debts against him, then whether claimants made such inquiries, or failed to make them, and notwithstanding they may have paid full value for the goods, they cannot be considered purchasers in good faith, and the jury should find for the plaintiffs, and find such goods subject to their execution. (Refused.)

Durr et al. v. Kelly et al.

5th. That if the jury find for the plaintiffs, they must find the value of each article levied upon separately, according to the evidence before them, except that where the evidence shows that any particular article or piece of property levied upon did not belong to the stock sold by W. to claimants, and if from the evidence the jury believe that the claimants intentionally intermixed said goods with their other goods, and so changed the marks that the officer making the levy could not distinguish or identify the said goods which the claimants bought from defendants; and at the time the officer went to the store to make the levy, claimants refused to point out the said W.'s goods, and they have not on this trial offered evidence which shows clearly what portion of the goods levied on did not belong to the said W.'s stock, then the jury must assess the value of all the goods so levied on and not proven to be of claimants' other goods. (Refused.)

The claimants then requested the court to give the jury the following charges in writing, to wit:

1st. If the jury believe from the evidence that W. intended to prevent a sacrifice of his property by a sheriff's sale under execution, and that his intent in selling to Kelly & Brother was to get the value of the property for the purpose of paying it to his creditors, then the sale was valid, although Kelly & Brother knew W.'s intent. (Given.)

2d. If the jury believe from the evidence that W., at the time of the sale of the goods to claimant, was insolvent, and sold the same for the purpose of paying preferred creditors, and for this purpose alone, then the purchase by Kelly & Brother was valid, even if they should believe from the evidence that they had knowledge of W.'s insolvency. (Given.)

3d. If the jury believe from the evidence that W.'s sale was made by him for the purpose of paying preferred creditors, and that he did apply the proceeds to the payment of such creditors, reserving what he thought was about equal to his exemptions under the law, then the sale to Kelly was valid. (Given.)

4th. Mere knowledge of W.'s insolvency by Kelly &
VOL. I.—28

Durr et al. v. Kelly et al.

Brother is not sufficient to render the sale void unless the object of W. was to hinder, delay, or defraud creditors.

5th. If the jury believe from the evidence that the sale made by W. was intended to supply the means of paying his debts, then the sale is not fraudulent and void merely because it may also have been the means of preventing execution creditors from sacrificing his property, and thus defeating the collection or payment of other debts. The intent to delay certain creditors from the collection of their debts by the due course of law will not necessarily vitiate the sale, though known and so far concurred in by Kelly & Brother. If it was made also with the intent and as the means of paying other or all creditors, and upon terms reasonably calculated to answer that purpose in a satisfactory manner, and to the extent of the value of the property it cannot be condemned merely because it may have been intended by W. to obstruct some of the creditors in the legal coercion of their debts, although this intention may have been intended and become known to Kelly & Brother. (Given.)

7th. The jury cannot find for the plaintiffs in this suit unless they believe from the evidence that the *purpose* and *intent* of W. in making the sale of the goods was to hinder, delay, or defraud his creditors generally, and this *purpose* and *intent* was known to Kelly & Brother, and participated in by them. (Given.)

Claimant also asked the following charges :

Charge B.—If the proof shows that the sale of the goods was open and notorious, and no concealment of the sale, and that a fair and full value and price has been paid for said goods by the Kellys, then such proof constitutes a strong circumstance to rebut the presumption of fraud, if any such presumption arises out of the evidence. (Given.)

Charge D.—That the notice to the Kellys, which the law charges as necessary to affect them, must be a notice of an intent on the part of W. to hinder, delay, or defraud his creditors, and before the Kellys can be made liable the evidence must satisfy the jury that the Kellys co-operated or concurred with W. in W.'s original design (if such was the fact), or by a

Durr et al. v. Kelly et al.

constructive co-operation or concurrence with W. from such design, and from carrying such design into operation with such . . notice. (Given.)

Charge E.—Where an allegation, whether negative or affirmative in form, involves a charge of fraud, the burden of proof is upon the party making the charge. In this case the burden of proof is upon the plaintiffs, and it makes no difference whether the plaintiffs at any stage of the trial made out a *prima facie* case on their side, if *after* that the claimants by proof have shown that they purchased the goods at open, notorious sale, and at a fair and full price, then the burden of proof is shifted back on the plaintiffs, and before the jury can find for the plaintiffs they must by evidence satisfy the jury that W. made the sale with the intent to hinder, delay, or defraud his creditors, and that the Kellys participated in the intent of said W. (Given.)

STONE, J.—In *Crawford v. Kirsky* (55 Ala., 282, 293), speaking of sales upon a new consideration, and not in payment of a debt, we, after mature consideration, announced the following proposition: "If the seller be insolvent, or in failing circumstances, and the purchaser knows or is in possession of information reasonably calculated to stimulate inquiry, and which, if followed up, would lead to the discovery that the purpose of the seller is to put his property beyond reach, or otherwise to delay, hinder, or defraud his creditors, then a purchase under these circumstances, though full consideration is paid, is invalid as against creditors. But, if the purchase be made without such knowledge and without such information as reasonably to put him on inquiry, he acquires a good title, no matter how fraudulent the intent of the seller."

In *Carraharan v. Hart* (21 Penn. St., 435), Judge Black declared the principle in the following language: "If a debtor, with the purpose to cheat his creditors, converts his land into money, because money is more easily shuffled out of sight than land, he, of course, commits a gross fraud. If his object in making the sale is known to the purchaser, and he,

Durr et al. v. Kelly et al.

nevertheless, aids and assists in executing it, his title is worthless as against creditors, though he may have paid a full price."

In *Hopkins v. Langton* (30 Wis., 379), a case of alleged sale of goods to defraud creditors, the judge below, in instructing the jury, had said: "I mean, you should not charge the plaintiffs with notice of fraudulent intent of the Red River Company, so as to avoid this sale, unless they had before them, at the time those goods were purchased, good and substantial evidence of it, such as sends conviction home to the mind and establishes a well-founded belief—nothing short of this would be sufficient to charge them with knowledge so as to defeat their recovery in this action." The revising court said: "This instruction . . . must be regarded as a modification of all the others, and was, in substance, informing the jury that, to charge the plaintiffs with notice of the fraudulent intent of their vendors, or to put them upon inquiry which, if omitted, was equivalent to notice, the plaintiff must have had at the time of the purchase actual knowledge of the fraudulent intent, or such evidence of it before them as would have been sufficient to establish the fact in a court of justice. A proposition so wide from the true rule of law governing in such case requires no argument to elucidate it." That court, in the same case, had previously said it was sufficient if the proof showed "knowledge by the vendee of the fraudulent intent, or the existence within his knowledge of other facts and circumstances naturally and justly calculated to awaken suspicion of it in the mind of a man of ordinary care and prudence, thus making it his duty to pause and inquire, and a wrong on his part not to do so before consummating the purchase."

It will be seen that under those authorities a sale, such as we are considering, is fraudulent and inoperative, if intended by an insolvent seller to delay, hinder or defraud his creditors, and that intent be known to the purchaser, or if he be in possession of information reasonably calculated to stimulate inquiry, and which, if followed up, would lead to a discovery of the seller's fraudulent purpose. The underlying morals on

Durr et al. v. Kelly et al.

which this sound principle rests, are, that it is the legal duty of every debtor to keep his property open to the claims of his creditors, and to make no effort to secrete it, or to sell it otherwise than for the honest purpose of paying his debts. If he secrete his property, or if he sell it with the intent or purpose of delaying, hindering, or defrauding his creditors—either one of the three purposes stamps his conduct as fraudulent, even if he sells for the full value, and the purchaser, although paying full value, acquires no valid title against the vendor's creditors if he aid him in consummating the fraud. He renders sufficient aid to invalidate his purchase when he knows the seller's fraudulent intention in making the sale, or has knowledge of facts and circumstances naturally and justly calculated to awaken suspicion in the mind of a man of ordinary care and prudence of the fraudulent intent of the seller. The cases of *Brown v. Force* (7 B. Monroe, 357), and *Brown v. Smith* (ib., 361), cannot be followed. Neither is the language of Mr. Bump on this question (chap. 8, paragraph 2) sufficiently accurate to be made a test or guide.

In *Borland v. Mayo* (8 Ala., 104, 114–115) is this language: "If a debtor in failing circumstances makes a transfer of his property to a third person, which is intended, both by the vendor and vendee, to prevent what they considered a sacrifice by sale under execution, and thus enable the vendor afterward to give a preference to his own proper creditors over those to whom he was liable as a surety, such transaction is a fraud upon the creditors who are hindered or delayed in the collection of their demands. There can be no question but an assignment made under such circumstances is inoperative." The court's *arguendo* added: "If the vendor had reserved to himself, by a stipulation on the face of the deed, the right to direct the appropriation of the money, such stipulation would have been void against judgment creditors, and the legal conclusion must be the same, although the deed is silent upon the subject, if the sale is the result of a fraudulent combination between a failing debtor and a third person to defeat the creditors of the former." There is evidently a verbal inac-

Durr et al. v. Kelly et al.

curacy in the above. The context proves it. Where it is said "such stipulation would have been void," the language to convey the idea intended should have been "such stipulation would have rendered the conveyance void."

There can be no doubt that this is a correct principle. If a debtor, either insolvent or in failing circumstances, sell his property—particularly if he sell it on credit—having at the time the purpose or intention of giving the preference in the subsequent use of the proceeds, as he might elect; and if his insolvency and intentionally reserved election be known to the buyer, or if the buyer have such information as to put him on inquiry, which, if followed up, would lead to the discovery of such intention, this would both hinder and delay the creditors not preferred, and the purchaser, as against such creditor, would acquire no valid title, even though he promised and paid full value for the property. Such loss is visited on the purchaser who thus buys, by reason of the fraud he has enabled the seller to perpetuate; enabled by purchasing his property, with knowledge, actual or constructive, of the seller's fraudulent purpose. But if the purchaser buys in good faith, pays a fair and reasonable price, without knowledge, or such information awakening suspicion as, if followed up, would tend to knowledge of the seller's fraudulent purpose, then such sale would be valid, no matter how fraudulent the seller's purposes may be; and this is right alike in morals and in law. It protects the purchaser who innocently pays his money for another's goods in ignorance of the seller's wicked purpose to hinder, delay, or defraud his creditors. It visits deserved punishment upon him, if, knowing the fraudulent purpose of his vendor, he aids him by becoming the purchaser of his goods. In the one case he acts in good faith, and must be protected. In the other he acts in bad faith and in bad neighborhood, by enabling the seller to defraud his creditors, and the law extends him no mercy.

Applying the principles stated above to the rulings in the present case, we will first consider the charges given at the request of the claimant. Charge No. 1 was erroneous. The sale

Durr et al. v. Kelly et al.

—two-thirds of it was on time. This necessarily had the effect to delay creditors. The charge ignores this, and in effect instructs the jury that, notwithstanding Wechsler's intent was to delay his creditors, yet if he made the sale "to prevent a sacrifice of his property by a sheriff's sale under execution, and his intent in selling to Kelly Brothers was to get the value of the property for the purpose of paying it to his creditors, then the sale was valid, although Kelly & Brother knew his intent." The hypothesis of this charge, as we interpret it, is, that although Wechsler in making the sale had the intent to delay his creditors until the maturity of the purchase-money obligations, and to hinder them in procuring a sale under legal process, and although Kelly & Brother knew this was his intent, yet if his purpose was to pay the proceeds of the sale to his creditors, the sale was valid. Such is not the law: shall not delay, hinder *or* defraud—either of the three—in the language of the statute, Code of 1870, Section 2124. This charge is also subject to criticism in this, that it allows to an insolvent vendor an indefinite discretion or caprice in the future direction of the proceeds of his goods, even when sold for the purpose of raising a fund to apply to his debts. *Borland v. Mayo* (*supra*). Charge No. 3 is objectionable for the same reason. No. 5 is erroneous. No. 7 is faulty, because it requires too much. If the intent be to defraud one or more creditors, that is enough. It is not necessary that fraudulent intent should embrace his creditors generally, or all his creditors. If Wechsler's intention in making the sale was to delay, hinder, or defraud his creditors, or some of them, and if the proof charged Kelly & Brother with knowledge of that intent, then the fact that the sale was open and notorious, and for a fair and full price, should exert no influence in the determination of the cause.

The court erred in giving Charge B. This is not of the class of cases to which the principle invoked applies. If the testimony tended to show that Kelly & Brother purchased, or pretended to purchase, that they might hold in secret trust for Wechsler, their openness and notoriety, and full price paid,

Durr et al. v. Kelly et al.

would be circumstances the jury should weigh in determining whether or not there was a secret trust. Charges D and E are substantially correct. So is Charge 4, as given at the instance of claimants. If they were calculated to mislead, that was a subject for an explanatory charge. Charge 6 is not assigned as error, and we will not consider it.

The third charge asked by plaintiffs is objectionable in form, and was calculated to confuse the jury. The hypothesis is based partly on facts to be found, and partly on declarations alleged to have been made by and to the claimants. Moreover, it pretermits all mention of some facts the testimony tends to prove. The facts supposed are each of an intermediate character, though each and all, if true, tended to excite suspicion. If by any fact or facts, or circumstances out of the usual routine, any claimants were reasonably informed, or their suspicions aroused that the purpose of Wechsler was to prevent his goods from being sold by the sheriff, he being in failing circumstances, and that for this purpose he was selling them on credit, that he might realize a better price, and leave him free to appropriate the proceeds as he might afterward determine, then, if such in fact was Wechsler's intent, Kelly & Brother could not acquire a good title by their purchase. Facts, not documentary or of record, but simply *in pais*, will not justify a stronger statement of the rule.

Charge No. 5, asked by plaintiffs, would be correct if it did not contain the word "clearly," in defining the measure of proof necessary to a proper separation of the goods. This is a civil action, and all that is necessary to establish any proposition for plaintiffs or claimants is reasonable conviction. On the hypothesis of this charge the duty would be cast on the claimants of furnishing the means of separating goods clearly theirs from those sought to be made subject to Wechsler's debt. A charge thus framed would be free from error. *Bond v. Ward* (7 Mass., 123); *Shumway v. Butler* (8 Pick., 443); *Taylor v. Jones* (42 N. H., 25).

The question put to Wechsler on cross-examination, and ruled out, was permissible. It tended to show the conduct and

Crouse et al. v. Frothingham et al.

purpose of the seller. It would not affect Kelly & Brother, unless brought to their knowledge before being purchased.

The court should have suppressed that part of the answer of claimant to the third interrogatory which is in the following language: "Said agent expressed himself well satisfied with the offer and conduct of said Wechsler." It was not responsive to nor explanatory of any part of the interrogatories propounded.

Reversed and remanded.

SUPREME COURT—NEW YORK.

MAY, 1882.

Where a debtor fraudulently conveyed real estate under an agreement by which he was to have the use of a portion of the premises for three years without rent, *Held*, That the interest of the grantor in the premises could be reached by his judgment creditors; that if he obtained only a parol lease for three years, which would be void under the statute of frauds, the consideration having been wholly paid, equity would decree performance to prevent irreparable loss.

Where an assignee for creditors refuses to bring an action to set aside a fraudulent conveyance, and allows such an action by judgment creditors, to which he is a party, to go by default, the plaintiffs, on succeeding, are entitled to the fruits of their vigilance to the exclusion of the other creditors.

DANIEL N. CROUSE et al., Respondents, v. LAURA FROTHINGHAM et al., Appellants.

APPEAL from judgment in favor of plaintiffs, entered upon decision of the court without a jury.

Action by judgment creditors of one Randolph, to reach his interest in certain real estate. The complaint states that Randolph conveyed a certain store, worth four thousand dollars, to Laura Frothingham in consideration of the payment of the mortgage liens thereon; that such conveyance was made as a device to cover a transfer to Arthur Frothingham; that such transfer was designed between R. and A. F. to defraud R.'s creditors, and to put his property beyond their reach; that

Crouse et al. v. Frothingham et al.

part of the agreement was that A. F., in addition to the consideration expressed, was to erect a new building and lease the ground floor and cellar to R. for three years without rent, or for a nominal rent; that A. F. afterwards refused to make the lease; that the consideration expressed in the deed was grossly inadequate; that R. had made a general assignment to one Mott, and that the assignee, who is a defendant, although informed of the facts, refused to take any action.

The court gave judgment in favor of plaintiffs for the value of the use and occupation, seven hundred and fifty dollars, subject to a mortgage, and directed a conveyance of the premises to a receiver appointed to sell them for the payment of plaintiffs' costs and the seven hundred and fifty dollars and interest.

R. A. Stanton, for appellants.

Ward Hunt, Jr., for respondents.

LANDON, J.—The objections urged by the defendants, that the declarations of one defendant, not forming part of the *res gestæ* of sale, were received in evidence against the others, do not appear to be sustained by the record. The declarations of a defendant are competent against himself, and the court was not asked to receive them against the others. Both Randolph and Frothingham in substance had stated, as witnesses testified, that part of the consideration of the sale was, that Randolph was to have the use of the building after sale, and the finding by the court in that regard is supported by evidence competent against each of them.

It was competent for the plaintiff to rebut the testimony of the defendants, though introduced as witnesses by himself. (Code Civ. Proc., Sec. 838; old Code, Sec. 393.) An effective way to do this was to prove the untruth of such testimony. As against either defendant his declarations out of court were competent for this purpose. That such evidence may incidentally tend to impeach the party called as a witness, does not impair its value as evidence upon the question at issue. It is

Crouse et al. v. Frothingham et al.

a proceeding very different from introducing him as worthy of credit, and then directly proving that he is not.

The court found that the conveyance by Randolph was upon the consideration in part that Randolph was to have the use and occupation of part of the premises for three years without rent, and that such use and occupation was worth seven hundred and fifty dollars.

If such reservation was effectual to vest in Randolph a legal interest in the premises to that extent, his judgment creditors can reach it. If the grantor simply obtained a parol lease for three years, and that is void by the statute of frauds, then, since the consideration for it was wholly paid, as between Randolph and his grantee, equity, in order to prevent irreparable loss, would decree the performance of it, and thus Randolph has an equitable interest of the same value, which his creditors can also reach. The statute of frauds cannot be set up as the support and protection of fraud. (Story's Eq. Jur., Sec. 330; *Hosford v. Merwin*, 5 Barb., 51, 58; *Willink v. Vanderveer*, 1 Barb., 599.)

In either case, fraud upon the part of the grantee, or notice of any fraudulent intent upon the part of the grantor, is not essential, since the proceeding touches only the property, legal or equitable, which the grantor retains. Fraud upon the part of the grantor exists. A conveyance by one indebted at the time, by which the grantor secures some benefit to himself at the expense of his creditors, is fraudulent upon the part of the grantor as to his creditors. (*Young v. Heermans*, 66 N. Y., 374.) In this case the purchaser is protected to the extent of his actual purchase. His grantor only is deprived of that which he reserved, or intended to reserve, out of the property for his own benefit.

It is urged that since the grantor made a general assignment for the benefit of creditors before the plaintiffs obtained their judgments, the action cannot be maintained by the judgment creditors, but should have been brought by the assignee; or if by virtue of the refusal of the assignee to bring the action it may be properly brought by the judgment creditor

Crouse et al. v. Frothingham et al.

upon making the assignee a party, the recovery, when had, must be for the creditors generally and in aid of the assignment.

The assignee having been made a party and suffered default, does not raise the question. No other party can assert his rights. The judgment in this action concludes him and protects the defendants from prosecution for the same cause at his hands. The right to maintain this action residing either in the assignee or the judgment creditor, the default of the assignee when made a party leaves the judgment creditor's right uncontested; and since, but for the assignment, the judgment creditor's right by virtue of his vigilance to apply the property of the debtor to the payment of his own judgment to the exclusion of the creditors generally would be complete, the same default leaves that right uncontested.

If there were to be any distribution of the assets of the judgment debtor among the creditors generally, it would have to be through the medium of the assignee. Frothingham is a creditor of the judgment debtor. He now claims that he can resist discovery until defeated, and then share in the assets discovered. It would be singular if, having aided the judgment debtor to create and to conceal these equitable assets, Frothingham could deny their existence and resist their discovery, and then when the plaintiffs, in a struggle with Frothingham, in which they are abandoned by the assignee, finally wrest them from his hands, they should be obliged to force the fruits of their victory into the hands of the reluctant assignee, and crave leave to share ratably with Frothingham in their distribution. Having made his election to resist the discovery of assets, Frothingham cannot now change sides and share in their distribution. If this action had been brought in behalf of creditors generally, no doubt the assets discovered could be administered by the assignee. (*Sands v. Codwise*, 4 Johns., 536; *Bate v. Jordan*, 11 N. Y., 237.) But our courts have not felt it to be a duty to assert the rights of the assignee when he himself has abandoned them (*Fort Stanwix Bank v. Leggett*, 51 N. Y., 552); or to look beyond the record for other creditors

In the Matter of Raymond, Assignee, etc.

among whom to dissipate the proceeds of the plaintiffs' vigilance. (*Dewey v. Moyer*, 72 N. Y., 70.)

The judgment should be affirmed, with costs.

LEARNED, P. J., and BOARDMAN, J., concurred.

SUPREME COURT—NEW YORK.

SEPTEMBER, 1882.

Seeley made a transfer of property to one Raymond, alleged to be fraudulent as to the creditors of the former and in contemplation of an assignment for the benefit of creditors, and then made a general assignment to the same person. Thereafter a new assignee was appointed, and the first assignee was called to account by a creditor. *Held*, That on such accounting the County Judge had no power to investigate the alleged fraudulent transfer and compel the first assignee to pay over the property thus fraudulently assigned.

In the Matter of the Accounting of EDMOND RAYMOND, Assignee, &c.

ONE Seeley, in 1873, made an assignment to Raymond for the benefit of his creditors. Afterward one Baucus was appointed such assignee in place of Raymond, removed. Under Chap. 318, Laws of 1878, a creditor of Seeley and Seeley himself petitioned the County Court that Raymond account as assignee. The matter was referred. The referee reported that Raymond should be charged with and should pay a certain sum to the creditors; but he refused to charge him with a certain further sum, arising from the following facts: The day Seeley assigned to Raymond he transferred to him a large quantity of potatoes, the avails of which Raymond agreed to hold for the benefit of Seeley. Raymond paid out a part of this money for Seeley's benefit, but there was a balance in his hands unexpended. The referee declined to charge Raymond with this balance. The County Court confirmed the report.

C. S. Lester, for appellants.

J. W. Hill, for Raymond, respondent.

LEARNED, P. J.—The first point made by the respondent is that the appellants failed to except to the report of the referee, and therefore no review could be made by the County

In the Matter of Raymond, Assignee, etc.

Court. (*Levy's Accounting*, 1 Abb. N. C., 177.) But the case before us states that all the evidence was submitted to, and considered by the court. Nor does it appear that any objection was made, before the County Court, to the hearing of the question now presented by this appeal. The case seems to have been prepared with the view of presenting the point in issue in a compact shape. And it would be unreasonable to dismiss this appeal for a defect which is really only formal.

The facts on which the question is raised are these: On the same day on which the assignor made his assignment, he executed to the assignee a bill of sale of some potatoes and a canal boat, which bill of sale was dated the day previous; and the assignee took possession of them. It was intended by the parties that this property should be held and disposed of by Raymond for the benefit of Seeley. The bill of sale was made in contemplation of the general assignment, and with the purpose of withdrawing the property from the creditors of Seeley. The potatoes were sold by Raymond for eleven thousand four hundred and sixty dollars. Raymond claimed to have paid, for the benefit of Seeley, out of the moneys, eight thousand five hundred and eighty-nine dollars and thirteen cents, leaving a balance of two thousand eight hundred and seventy dollars and eighty-seven cents, not paid to Seeley or accounted for. Among the items so claimed to have been paid by Raymond out of these moneys is a note, called the Ames note, of one thousand one hundred and thirty-six dollars and ninety-four cents, which was in fact paid by Seeley. The amount of this note, added to the above balance, makes four thousand and seven dollars and eighty-one cents, which sum the creditors and the substituted assignee claimed should be charged to Raymond as assets, now remaining in his hands, on this accounting. Thus the question which the appellants present is this: One person makes a transfer of property to another, alleged to be fraudulent as to the creditors of the former, in contemplation of the assignment about to be made, and then makes a general assignment to the same person, for the benefit of creditors. An accounting of the assignee is had before the county judge,

In the Matter of Raymond, Assignee, etc.

after a new assignee has been appointed. Can the judge, on such accounting, and on behalf of the creditors of the assignor, investigate the transaction, and if he should decide that the transfer was fraudulent, compel the assignee to account for and pay over the property, or the avails thereof, thus fraudulently transferred before the assignment? In examining this question we must first observe that the property thus fraudulently transferred is not, in terms, held on the trusts of the assignment. The assignor has a right to compel the performance by the assignee of these trusts. But if the assignor, prior to the making of the assignment, had transferred property to the person who was afterward assignee, in fraud of the creditors of the assignor, such assignor could not afterward reclaim that property. Though void as to his creditors, the transfer would be good as to him.

The finding in this case is that the potatoes were transferred, to be held and disposed of for the use of Seeley. If this trust were void as to Seeley's creditors, still he could not assert its invalidity. If it were a valid trust, it could only be enforced by Seeley; and that, too, not in this proceeding, but in some independent action.

Hence it follows that the assignee cannot be held to an accounting here on the ground that the property transferred was part of the assigned property, and was taken by the assignee on the trusts of the assignment. Indeed, the claim of the creditors and of the assignor is directly contrary to this view. They claim to hold the assignee on the ground that the prior transfer was fraudulent as to the assignee and that he could repudiate it; that it was his duty to do so, and to hold the property as assignee and adversely to the transfer.

Again, we do not see that the assignor has any right of this kind. Assuming that the transfer was fraudulent as to his creditors, Seeley has no right to attack that transfer, directly or indirectly. Whatever right his creditors may have, it is plain that he cannot, by the indirect proceeding of calling the assignee to an accounting, under the trusts of the assignment, reclaim property transferred by him, previously to the assign-

In the Matter of Raymond, Assignee, etc.

ment, in fraud of his creditors. Nor can he, in this indirect manner, reclaim this property for his creditors. To pursue that property may be their right, but is not his.

We pass then to the rights of creditors of Seeley. The appellants compare the position of the assignee to that of an executor. And it may be worth while to look briefly at the course of the law in similar cases as to executors. Where a person had made a conveyance of goods, fraudulent as to creditors, his executor could not, before the Revised Statutes, reclaim the goods. (*Osborne v. Moss*, 7 Johns., 161.) The remedy of the creditor was to treat the fraudulent grantee as executor *de son tort*. But since the Revised Statutes the personal representative of the grantor may controvert the validity of the sale. (2 R. S., 449, Sec. 17; *Babcock v. Booth*, 2 Hill, 181.) And ordinarily he alone. (*Bate v. Graham*, 11 N. Y., 237.) Still, however, the voluntary assignee of the assignor could not impeach the validity of a fraudulent transfer (*Brownell v. Curtis*, 10 Paige, 210, at 219); although a receiver in proceedings supplementary might. (*Porter v. Clark*, 12 How. Pr., 107.) But the act of 1858 (Chap. 314) gave power to an assignee, as well as to an executor, etc., to "disaffirm, treat as void, and resist all acts done, transfers and agreements made in fraud of the rights of any creditor."

Now it is insisted by the appellants that the assignee cannot sue himself in order to disaffirm the fraudulent transfer; and therefore that, on his accounting, the county judge may pass upon the question of fraud in the transfer, and charge him with any property thus fraudulently received. And they rest upon the authority given by Chapter 466 of 1877, amended by Chapter 318, Laws of 1878, especially by subdivision 2 and subdivision 9, Section 20. These subdivisions give the county judges such powers as the surrogate has in reference to the accounting of an executor.

It seems to be settled that a surrogate has jurisdiction to pass on the validity of a personal liability of an executor to the estate which he represents (*Gardner v. Gardner*, 7 Paige, 112); and of a debt from the testator to the executor personally.

In the Matter of Raymond, Assignee, etc.

(*Kyle v. Kyle*, 67 N. Y., 400.) In the language used in these cases, and those like them, the courts have spoken of debts, or claims, which existed between the testator and the person appointed his executor in favor of one or of the other. And they have said that, for the reason that the executor could not sue himself, and might not pay himself, the claims must be adjusted before the surrogate. (*Kyle v. Kyle*, *ut supra*.) But none of these cases are quite like the present, inasmuch as the alleged liability here is one which in the analogous relationship could not exist between the testator and the person named as executor. No liability, as is well known, could arise in favor of the fraudulent assignor, or in favor of one claiming under him but not representing creditors.

To illustrate: A legatee, on an accounting of an executor, could insist on an adjudication that the executor pay a debt which he had owed to the testator, and which he still owed to the estate. But we suppose that the legatee, who is not a creditor, could not insist that an executor should disaffirm, etc., a conveyance made by the testator to some third person in fraud of creditors; and if not, then certainly not that the executor should account for property transferred to him in like fraud. This shows that the general language used as to the liability of an executor to account before the surrogate for a debt which he owes the estate cannot safely be extended to include, as such a debt, the right which the executor has to disaffirm, etc., conveyances which are fraudulent as to creditors. That, it would seem, is a right which, on general principles, exists solely for the benefit of creditors, not for any others interested in the estate. As to any others than creditors of the testator it would seem that there would be no right to disaffirm. We do not decide this point, but use it, by way of illustration, to show that the alleged liability in such cases would not be one owing to the testator. And in the present case it is not a liability owing to the assignor. If the transfer had been to a third person, there would have been simply a right of action which the assignee, in the interests of creditors, might exercise, and which, in a proper case, he ought to exercise.

In the Matter of Raymond, Assignee, etc.

The neglect of the assignee, in a proper case, to bring the necessary action against a third party, to set aside such a fraudulent transfer, might make him liable to the extent of the loss sustained. But the question of his liability in such a case would plainly involve other considerations than the mere amount of property alleged to have been fraudulently transferred. It would involve the assignee's knowledge that the transfer was fraudulent, and the prospect of a recovery which would be beneficial to the estate. And it is worth noticing here that, while the findings hold that it was intended by the parties that the potatoes should be held for the benefit of Seeley, they do not find that Raymond accepted them with knowledge of a fraudulent design. Indeed it would seem that a large amount of the avails was used to pay certain creditors of Seeley.

There is certainly a serious difficulty in holding that when A. becomes assignee of B., for the benefit of creditors, the acceptance of the assignment authorizes the county judge, on an accounting, to investigate any transaction, not barred by the statute of limitations, by which, in previous years, and before the assignment, B. may have sold property to A., and to hold, after such investigation, that the sale was fraudulent, and to compel A. to account for the avails. Certainly nothing but necessity would justify such a doctrine.

And again, the assignee is now required to give bonds for the due accounting for all moneys received by him, etc. Now, if the county judge can determine that the avails of the property previously transferred are moneys received by the assignee under his trust, then the sureties of the assignee may be made liable, not merely for the property actually transferred by the assignment, but for the avails of property long before transferred, on trusts entirely different, or on no trusts at all.

These are some of the reasons why we should be very reluctant to adopt the principle urged by the appellant, even in a case of necessity. But we think that no such case exists here. It will be seen by reference to the opinion in *Kyle v. Kyle*, and to other cases, that the reason for charging an

In the Matter of Raymond, Assignee, etc.

executor, on his accounting, with a debt which he owed the testator, is the necessity of the case, because he could not sue himself. That reason ceases when the alleged debtor is not the executor. And the reason why the appellants claim that an assignee should be chargeable with property which had been previously transferred to him in alleged fraud of creditors is because he, in like manner, could not sue himself. But no such difficulty exists in this case. There is a new assignee. He is abundantly capable of bringing and maintaining any proper action, as such assignee, against Raymond, who is assignee no longer. The avails of the potatoes, as has been shown, were not properly a part of the property assigned by the general assignment, even though Raymond may be chargeable therewith in behalf of creditors. They have never come into his possession in his character as assignee. No necessity exists for charging him therefor, on his accounting, if any such necessity would arise under any circumstances.

We do not see why an assignee who should learn that creditors claimed that a previous transfer to him was fraudulent might not resign and have a new assignee appointed, so that he could defend his rights under the previous transfer in the ordinary modes of litigation, and not be embarrassed by the difficulty of a contest over that question upon a mere accounting for the property received under his trust. At any rate, as this present case stands, there is no difficulty in the way. The present assignee, Baucus, can sue Raymond for any money fraudulently transferred by Seeley. And in such action the questions involved can be tried in the manner and by the tribunals to which such questions properly belong.

Judgment of County Court affirmed, with costs against appellants.

BOARDMAN, J.—The transfer of the potatoes, etc., by Seeley to Raymond was valid or voidable. If it was valid, the trust created was separate and independent from that created by the general assignment, and should not be mixed up with it. Raymond is still trustee under the first transfer, and Baucus is not

Frazier v. Truax, Assignee, etc.

his successor as to that. If the transaction were fraudulent the title to the property was still out of Seeley when his general assignment was made, and hence did not pass thereby. The creditors of Seeley in equity might attack that transfer as fraudulent. But in neither case do we think the creditors of Baucus, as their representative, could require Raymond to account for property which he did not acquire by virtue of the general assignment, which he did not inventory as assignee, and for which his bondsmen do not purport to be holden. It is a transaction outside of the general assignment, and whether it results in a surplus after discharging a valid trust for the payment of certain of Seeley's creditors, or whether it was fraudulent in fact or in law as to the creditors of Seeley, the remedy must be by action, and not upon an accounting before the County Court.

I concur, therefore, in the affirmance of the judgment of the County Court.

SUPREME COURT—NEW YORK.

SEPTEMBER, 1882.

The whole of an assignment for the benefit of creditors must be expressed in the written instrument.

The assignors concededly were not indebted to all the persons in whose favor preferences were made. They alleged, in explanation that the debts, though not owing to the persons named, were owing to other persons, and that the preferences were made, as it were, in trust for the real creditors. No such trust, however, was declared in the face of the assignment. *Held*, That the scheme was fraudulent in law, and that the assignment was void.

CHARLES FRAZIER, Appellant, v. CHARLES H. TRUAX, Assignee, &c., Respondent.

Thomas Stevenson, for appellant.

Thomas H. Hubbard, for respondent.

CULLEN, J.—As to three of the preferred claims set forth in the assignment, concededly the assignors were not indebted to the persons in whose favor the preferences were made. Unless explained, these preferences for fictitious debts would render the assignment fraudulent.

Frazier v. Truax, Assignee, etc.

The explanation offered is that the debts, though not owing to the parties named, were owing to other persons, and that the preferences were made, as it were, in trust for the real creditors. I do not think such a method valid. No trust is declared on the face of the assignment; and I doubt if, in favor of the real creditor, it would be competent to show the trust by parol. By the statute the assignment must be in writing, and be acknowledged and recorded; otherwise it is void. Therefore I think the whole of the assignment must be expressed in the written instrument; and not a most important part of it, that is, to whom preferences are to be really made, rest in mere words. In the case of the preference to Beaver he knew nothing about it, nor ever accepted the trust in favor of Mrs. McCullem, nor do we think that the evidence established the *bona fides* of the debt to Mrs. McCullem.

If this mode be tolerated it will make most glaring frauds easy of accomplishment. It is settled law that a power reserved to either the assignor or assignee to designate future preferences renders the assignment void. (*Sheldon v. Dodge*, 4 Denio, 217.) To be valid the instrument must definitely settle the respective rights of the creditors.

If the real parties intended to be preferred are to be known only to the assignor and assignee, it will put it in the power of these persons to declare at any future time, without fear of contradiction, that any particular persons whom they see fit were the real parties intended to be preferred, at least any whose debts approximate to the debts named in the preferred schedule. And if such declaration be made in favor of any creditor, why may not the parties declare subsequently that their previous statement was an error, and that the person really to be preferred was another creditor? I think this scheme fraudulent in law, and that the assignment was void.

The judgment should be reversed on questions of fact and law, and a new trial ordered, costs to abide event.

BARNARD, P. J., concurs.

In the Matter of Hulburt et al. to Van Sinderin, Assignee, etc.

DYKMAN, J. (dissenting).—This is an action by judgment-creditors to set aside a voluntary general assignment for the benefit of creditors, containing preferences. The assignment is challenged by reason of the four preferences to Hansett, Lamont, Blaners and Wilcox, and special findings have been made by the trial judge respecting each of these claims. These findings show entire freedom from fraud, and they are all well supported by the testimony.

An extended examination of the proof would be only a collation of the facts contained in the findings, and these are sustained by proof; the result would be the same.

The plaintiffs had reason for the commencement of the action, as there were some matters quite suggestive of fraud without explanation. Hence the complaint was properly dismissed without costs.

The judgment should be affirmed, with costs.

COURT OF APPEALS—NEW YORK.

MAY, 1882.

An assignee for the benefit of creditors is only entitled to commissions on the amount that has come into his hands, and not upon the value of all the property assigned to him. Where he has received no money on which commissions can be computed, the case is not provided for by statute, and the court may, before compelling him to return the assigned property to the assignor after a composition, order a suitable and reasonable compensation as a condition of such return.

In the Matter of the Assignment of MILAN HULBURT et al. to ADRIAN VAN SINDERIN as Assignee, &c.

APPEAL by the assignors from an order of the General Term of the Court of Common Pleas in and for the City and County of New York, made February 6, 1882, which modified, and affirmed as modified, an order of Special Term on settlement of the accounts of Adrian Van Sinderin, as assignee for the benefit of creditors of Milan Hulburt and William A. Hulburt, composing the firm of Merwin, Hulburt & Co.

The material facts are stated in the opinion.

Samuel Hand, for appellants.

In the Matter of Hulburt et al. to Van Sinderin, Assignee, etc.

The amendment of 1878 to the General Assignment Act of 1877, fixing the assignee's commissions at five per cent. on the whole sum which will have come into his hands, should be construed so as to carry out the policy of the common law. (*Chamberlain v. The West. Trans. Co.*, 44 N. Y., 305; *Donaldson v. Wood*, 22 Wend., 395; *Jewett v. Woodward*, Edw. Ch., 195; *Barney v. Griffin*, 2 N. Y., 365; *Nichols v. McEwen*, 17 id., 22; *Campbell v. Woodworth*, 24 id., 304; *Duffy v. Duncan*, 35 id., 190; *Jacobs v. Remsen*, 36 id., 668; *Ogden v. Murray*, 39 id., 202.) The assignee should recover five per cent. on all sums of money which will have come into his hands by the performance of his trust in collecting debts and in realizing upon assets. (*In re Shaw*, 18 Hun, 195; *In re Kenyon v. Cox*, Com. Pl., Sp. T., August, 1877, cited in Kieley on Insolvent Assignments, 137; 2 R. S. [2d ed.], 47, Sec. 29; *Duffy v. Duncan*, 35 N. Y., 190; *Case of Bunch*, 12 Wend., 280, 284; *In re Woven Tape Skirt Co.*, 85 N. Y., 506; *McWhorter v. Benson*, Hopk. Ch., 28; *Wagstaffe v. Lowerre*, 23 Barb., 209; *DePeyster Case*, 4 Sandf. Ch., 511; *Bennett v. Chapin*, 3 Sandf. Sup. Ct., 673; *Schenck v. Dart*, 22 N. Y., 420; *Meacham v. Sternes*, 9 Paige Ch., 298; *Cairns v. Chaubert*, id., 160; 3 R. S., Part 2, Chap. 6, Art. 3, Sec. 71; Sec. 2736 of the Code, as amended June 16, 1881, Chap. 535; *Van Buren v. Chenango Ins. Co.*, 12 Barb., 671; *German-Am. Bk. v. M. R. C. Co.*, 68 N. Y., 585.) The provision of the order made at Special Term, vacating the allowance of two thousand dollars to counsel for the assignee, for services upon the accounting, is eminently proper and should be sustained. (*In re Assignment of Curren*, 8 Daly, 122; *In re Weinhaus*, 5 Abb. N. C., 355; *Havemeyer v. Loob*, id., 338; *Burtis v. Dodge*, 1 Barb. Ch., 77; Redfield on the Law and Practice of Surrogates' Courts [latest ed.], 710.) The General Term erred in referring the claim for services rendered upon the accounting back to the referee. (*In Levy's Accounting, In re Assignment of Curren*, 8 Daly, 122; *Tilton v. Beecher*, 59 N. Y., 176; *Morris v. Wheeler*, 45 id., 708.) Allowances can only be made in the reasonable discretion of the court, and if unreasonably made are appealable. (*Down-*

In the Matter of Hulburt et al. to Van Sinderin, Assignee, etc.

ing v. *Marshall*, 37 N. Y., 380; *Wetmore v. Parker*, 52 id., 450.) The referee's fees, being in excess of the statutory allowance, were improperly granted. (Code, Sections 3296, 3297; *Curren Case*, 8 Daly, 119.)

John L. Sutherland, for respondent.

On surrendering the estate, the assignee was entitled to five per cent. commissions on its true value, notwithstanding the composition. (Laws of 1878, Chap. 318, Sec. 7; 3 R. S. [5th ed.], 119, Sec. 31; 2 R. S., 46, Sec. 29; *Matter of Bunch*, 12 Wend., 280; *German-Am. Bk. v. M. R. C. Co.*, 68 N. Y., 589, 590; *Hildreth v. Ellice*, 1 Caines, 192; *Bolton v. Lawrence*, 9 Wend., 435; *Parsons v. Bowdoin*, 17 id., 14; *Crofut v. Brandt*, 58 N. Y., 106; *McWhorter v. Benson*, Hopk. Ch., 28; *Matter of Bunch*, 12 Wend., 280; *Cairns v. Chaubert*, 9 Paige, 160; *Meacham v. Sternes*, id., 404, 405; *Matter of DePeyster*, 4 Sandf. Ch., 511; *Bennett v. Chapin*, 3 Sandf. Sup. Ct., 673; *Van Buren v. Chenango Ins. Co.*, 12 Barb., 673; *Wagstaffe v. Lowerre*, 23 id., 226, 227.) The order appealed from is not a final order, and no appeal lies to this court from it. (Code of Civil Procedure, Sec. 170; *Clark v. Brooks*, 1 Abb. Ct. of App. Dec., 355; *Hollister Bk. v. Vail*, 15 N. Y., 593; *Tompkins v. Hyatt*, 19 id., 534; *Catlin v. Grissler*, 57 id., 363; *Swartwout v. Curtis*, 4 id., 415; *Butler v. Lee*, 3 Keyes, 70.)

EARL, J.—On the 28th of October, 1880, Milan Hulburt and William A. Hulburt, the appellants, who were doing business as a firm in the city of New York, having become financially embarrassed, made a general assignment for the benefit of their creditors, to the respondent Van Sinderin. The assignee took formal possession of the assigned property, which consisted of merchandise and book accounts. The property remained in the store of the assignors in charge of their former bookkeeper, who was selected by the assignee as his representative. The assignors and the person thus placed in charge sold goods and made collections to the amount of forty-five

In the Matter of Hulburt et al. to Van Sinderin, Assignee, etc.

thousand three hundred and seventy-four dollars and fifty-three cents, which sum was paid to and received by the assignee. Thereafter, before the close of January, 1881, all the creditors of the assignors executed a composition deed, by which they agreed to accept the notes of the assignors for sixty per cent. of their claims and release the assignors and their estate, as well as the assignee and his sureties, from all liability to them. The composition was brought about solely by the efforts of the assignors, and the assignee did not personally sell any of the property or collect any of the debts. In March, 1881, an order was made by one of the judges of the New York Common Pleas, appointing a referee to take and state the account of the assignee. A hearing was had before the referee, and he found the actual value of the property assigned to be two hundred and thirty-two thousand nine hundred and forty-one dollars and eight cents, and he determined that the assignee was entitled to five per cent. for his commissions on that sum, amounting to eleven thousand six hundred and forty-seven dollars and five cents, and he allowed to the counsel of the assignee, for his services before the accounting, two thousand dollars, and for his services upon the accounting another sum of two thousand dollars. The General Term of the Common Pleas confirmed the decision of the referee as to these items, except as to the counsel fee upon the accounting, and referred that back to the referee for a further hearing as to the value of the services of the counsel upon the accounting. From the decision of the General Term the assignors have brought this appeal, and here complain mainly of the amount allowed for commissions. They claim that the commissions should have been computed only upon the sum of money which came into the hands of the assignee, while he claims that his commissions were properly computed upon the value of all the property which was assigned to him.

Section 26 of the General Assignment Act of 1877, as amended by Section 7 of Chapter 318 of the Laws of 1878, provides that the assignee shall receive for his services "a commission of five per centum on the whole sum which will have

In the Matter of Hulburt et al. to Van Sinderin, Assignee, etc.

come into his hands," and the matter now to be decided is, what was meant by this language? If it had been stated in the section that the commission was to be five per centum on the entire value of the property, or amount of property, or sum of money, it would have been plain enough. The words "the whole sum" are entirely inappropriate to express the entire amount of property, but they are appropriate to express the whole sum of money which may have come into the hands of the assignee, and we think they were used in that sense. The rate of commission is a large fixed sum, larger than is allowed in other analogous cases, such as sheriffs, executors, administrators and trustees. The statute contemplates the possibility of such a composition as was made in this case, and provides for the discharge of the assignee when it is made. Thus it may turn out that the assignee may be discharged from all liability before he has done anything except to execute his bond and take formal possession of the assigned property, and if the Legislature had intended, in such a case, that the commission should be computed upon the value of all the property assigned, more appropriate language would, we think, have been used. In most cases where compositions are effected by the assignors, the commission of five per cent. on the whole property assigned would be greatly disproportionate to the value of the services rendered by the assignee, and we think the Legislature, in fixing the rate of commission, had in mind only the money which should come into the hands of the assignee.

It may be said that this construction will deprive the assignee of any compensation in case a composition is made by the assignor before the assignee has converted any of the assigned property into cash. Such cases, however, will not be common, and the assignee can always protect himself by an agreement with the assignor before he accepts the assignment as to the amount of his compensation in case of a composition. Such an agreement would be valid as between the assignor and assignee, while it would be invalid so far as it affected the interests of creditors. When one voluntarily consents to act as as-

In the Matter of Hulburt et al. to Van Sinderin, Assignee, etc.

signee he must either take what the law gives him or, where the rights of creditors are not concerned, what the assignor agrees to give him. And it may be said further, that when the assignee has received no money upon which his commissions can be computed, the case is not provided for by the statute, and the court may, before it will compel him, after a composition, to return the assigned property to the assignor, order a suitable and reasonable compensation to be made to him as a condition of such return.

We do not intend by this construction to alter or affect the rules which have been laid down for computing the fees or commissions of sheriffs, executors, administrators, and trustees. A sheriff is not a volunteer. He discharges a duty imposed upon him by law, and his fees are not large, and the commissions of executors and trustees are not large, and would not be excessive in most cases if computed upon the whole property which has come into their hands, and which in the end they may distribute or dispose of as money. Our construction of the act now under consideration is confined to the language used and the consideration of what we conceive to have been the purpose of the Legislature.

Much reliance is placed by the assignee upon the case of *In re Bunch* (12 Wend., 280). In that case an attachment was issued at the instance of one Mitchell against Bunch, a non-resident debtor, and trustees were appointed, and the trustees caused Bunch to be brought before the officer who issued the warrant of attachment, and while the proceeding was pending Bunch compromised with Mitchell, and gave him a bill of exchange for upward of nineteen thousand dollars, in consideration whereof Mitchell gave him a general release and discharge from all liability. In that case the statute provided that the trustees should receive a commission of five per cent. on the "whole sum which shall come into their hands," and the court held that the trustees were entitled to their commissions on the whole amount of the bill of exchange, although it did not come into their hands. The bill of exchange was received by the creditor as so much money, and that was the sum realized by

In the Matter of Hulburt et al. to Van Sinderin, Assignee, etc.

the proceeding which was instituted. SAVAGE, C. J., writing the opinion of the court, said: "The meaning of the act is that the trustees shall receive a commission upon such sum as shall be realized in consequence of the proceedings instituted, and can there be a doubt but that the attaching creditor received upward of nineteen thousand dollars in consequence of these proceedings?" It is thus seen that that case is entirely unlike this. Here nothing was realized by the efforts of the assignee, and in no sense was the property assigned to him converted into cash or disposed of by him as cash, except as to sales and collections actually made.

Our recent decision in the Matter of *The Woven Tape Skirt Co.* (85 N. Y., 506) furnishes some support to the conclusion we have reached.

Commissions have sometimes been allowed on the whole amount of property which has come into the hands of a trustee as an equitable mode of adjusting his compensation; but constructive commissions, that is, commissions on property not converted into cash, may, upon an equitable accounting, be refused to a trustee, where their allowance would be inequitable and unjust. Here the commissions claimed are so disproportionate to the value of the services rendered that their allowance cannot be justified upon any principles of equity or justice. The rule which gives the assignee his commissions upon the money which actually came into his hands, will, in this case, measure the compensation more accurately and justly than any other which could be adopted.

As to the two thousand dollars allowed to the assignee for the services of his counsel prior to the accounting, there was but a very meagre case upon which to base such an allowance. The assignee was an attorney and counsellor-at-law. The printed record does not disclose that there was any litigation or dispute about any thing connected with the assigned estate. It is not revealed how the services of an attorney came to be needed, or what particular services he rendered for which a compensation of two thousand dollars could be claimed, but as there was some evidence to sustain the charge, and the court

The Howard National Bank et al. v. King et al.

below was satisfied with it, we will not disturb it. As to the charge of two thousand dollars for services of counsel upon the accounting where there was no dispute, contest, or litigation, we think the court below did well to refer that item back for further investigation.

Our conclusion, therefore, is, that the judgment of the court below should be modified by reducing the commissions allowed to two thousand two hundred and sixty-eight dollars and seventy-two cents, five per cent. on the money actually received, and as thus modified, affirmed without costs in this court to either party.

All concur, except TRACY, J., absent.

NEW YORK SUPREME COURT—SPECIAL TERM.

DECEMBER. 1881.

Where defendant L., who made an assignment in the State of New Jersey for the benefit of creditors, valid according to the laws of that State, though invalid here, had certain claims and credits in this State, which were attached in this action, *Held*, That though movable property may have an actual situs apart from that of the domicile of the owner, there is no such rule as to claims and credits; and as to these the assignment in New Jersey was effectual to pass to the assignees a valid title, and the assignees having taken possession of the same, and having received the avails and proceeds, cannot be disturbed in their rights to the property by this action or the attachment issued therein.

THE HOWARD NATIONAL BANK et al. v. WILLIAM KING et al.

C. Bainbridge Smith, for plaintiff.

A. P. Whitehead and *M. W. Divine*, for defendants King and others.

VAN VORST, J.—The assignment which is attacked in this action was made in the State of New Jersey by the defendant Locke, who was a citizen of that State. This instrument, al-

The Howard National Bank et al. v. King et al.

though made a subject of contention in the courts of this State, has been finally adjudged to be valid by the law of the State in which it was made. (*Boese v. King*, 78 N. Y., 471.)

Plaintiff, however, contends that as to property of the assignor situated within this jurisdiction at the time of the execution of the assignment, the validity of the transfer must be determined by the law of New York and not by that of New Jersey. And that as an assignment made by an insolvent debtor for the benefit of his creditors, tested by the law of this State, it is made subject to conditions which have been condemned within this jurisdiction.

The plaintiff corporation, being a creditor of the assignor, procured an attachment to be issued out of this Court to the Sheriff of the County of New York against the property of the defendant Locke, upon the ground of his non-residence within this State; and it is claimed on behalf of the plaintiff that the attachment has been levied upon a portion of the assigned estate in the hands of the assignees within this State; and that notwithstanding the assignment, which, for the reason above stated, is claimed to be void within this State, plaintiff is entitled to hold and have the same applied toward the satisfaction of its demand against the assignor.

Before the service of the attachment all the assignor's property had been reduced into their actual possession by the assignees, and through sales and collections had been turned into money; and it was these proceeds only, therefore, which consisted of money to the credit of the assignees on deposit in a bank in the City of New York, which could in any event be subjected to lien of the attachment, or be reached in this action.

The title to these moneys being in the assignees, and not in the debtor, at the time of the commencement of this action, they could only be reached in equity and through an action, the purpose of which, in form and effect, would be to condemn the assignment as void by the law of this State, although valid in New Jersey, and to reach and apply these moneys, as equitable assets of the debtor, on the plaintiff's judgment.

The Howard National Bank et al. v. King et al.

The learned counsel for defendants, the assignees, upon the trial interposed several objections to plaintiff's right to maintain this action, only one of which, however, need be discussed.

The substance of this objection is that the assignment, being voluntary and valid by the law of the assignor's domicile, operated as a transfer of the assignor's property not only in the State of New Jersey, but also of his property in this State, at the time of the assignment, and that the assignees can hold the property and its proceeds against attaching and judgment creditors, especially when, as in this case, the attaching creditor is not a resident nor a citizen of this State.

In disposing of this objection two facts should be noted: one is, that the transfer was voluntary and not in proceedings *in invitum*, made by the defendant Locke, in the State of New Jersey; and the other is, that before the attachment was served the assignee was in full possession of and had actually converted into money the assets and property which, it is claimed, were in New York at the time of the transfer.

But the underlying question is, Did any of the assigned property have any actual situs within this State at the time of the execution of the assignment? The rule in regard to personal property, that it has no situs, but that it follows the person of the owner is elementary. As a corollary from that rule it follows that personal property is governed in its transfer and disposition by the law of the domicile of its owner, that is, by the law of the place where the sale is made, so that if a sale or other transfer be valid where made it is valid everywhere.

But the rule itself is subject to the exception that the transfer is not valid in another State, in which the property is actually situated, if it conflicts with the law of that State.

While this exception seems to be logically inconsistent with the rule and corollary above mentioned, it seems to have arisen in an endeavor to protect the citizens of the latter State, who are entitled to the benefit and protection of its laws, in their claims upon property actually within its jurisdiction, and in whose favor the comity due to other States and laws must yield.

This exception is also based upon the notion that notwith-

The Howard National Bank et al. v. King et al.

standing the legal fiction with respect to personal property—that it has no situs, but follows the person of the owner—movable property may have an actual situs, apart from that of the domicile of the owner. From an examination of the authorities, in the light of the rule, I am of opinion that the exception affects only movable property, and does not operate upon credits or other choses in action held by the person who makes the assignment or transfer, and that in so far as they are concerned they are governed by the general rule above mentioned, and that they have no situs apart from the domicile of their owner, and if a transfer of them be made in the State in which the owner is domiciled, which is valid there, it is effectual everywhere. (Story on Conflict of Laws, Sections 397, 398, 399 et seq.)

I do not think it at all necessary to notice further in this connection any case other than that of *Guillarder v. Howell* (35 N. Y., 657), which is exceedingly clear upon this subject. Justice Peckham, in the opinion of the Court, says: “The Supreme Court, in the Third District, at General Term, in *Thurman v. Stockwell*, lately held, that the exception did not extend to a debt due from a resident in Connecticut to a resident of this State, but that an assignment thereof valid here, though invalid there by her laws, ought to be valid there also, even as against residents of Connecticut, because a debt is not a corpus capable of local position, but merely a jus incorporeal.”

Justice Peckham also refers to the case of *Speed v. May* (17 Penn. St., 91) and *Caskie v. Webster* (7 Wallace, 131), which he pronounces to be sound law, and which cases hold in substance that a debt is a mere incorporeal right. It has no situs, and follows the person of the owner. The property of the assignor, Locke, claimed to have been within this State at the date of the assignment, consisted exclusively of credits.

Before the assignment there stood to his credit in the Importers' and Traders' Bank in the city of New York the sum of two thousand dollars and upward. In anticipation of the assignment which he was about to make, the money was drawn from the bank by Locke and was turned over to one Field,

The Howard National Bank et al. v. King et al.

who deposited the same in bank to his own credit, as the representative of the future assignees, to whom it was to be delivered for the purposes of the assignment. The matter stood in this form when the assignment was executed. In so far as this credit was concerned the assignor had no legal claim or property right to the same. As to him such legal right was ended when Field took the fund for the purposes to which it had been dedicated. If any interest remained in Locke, it was equitable only, which interest was satisfied when Field turned over the amount, as he afterward did, in fulfilment of his trust, to the assignees. Whatever other interests remained in Locke in this State, if any, at the time of the assignment, were in the form of claims against persons indebted to him.

The assignment, therefore, made by Locke in the State of New Jersey of these claims and credits, upon the principles above stated, was effectual to pass to the assignees a good and valid title, and, the assignees having taken possession of the same, and having received the assets and proceeds, cannot be disturbed in their rights to the property or its proceeds by this action or the attachment issued therein.

The substantial object and purpose of this action and the attachment was to reach property of the assignor having a situs within this State, claimed by the assignees under a transfer invalid by the law of this State, but valid in the State where it was made. The action is in this regard, therefore, one in the nature of a suit *in rem*. There being no such property within this jurisdiction, the suit and attachment are purposeless, and must wholly fail. The plaintiff's complaint must, therefore, be dismissed with costs.

Tim et al. v. Smith ; Boyd et al. v. Smith.

NEW YORK COMMON PLEAS—SPECIAL TERM.

No presumption of fraud will arise from the mere fact of a defect in the form of the certificate of the acknowledgment of a general assignment for the benefit of creditors.

To show that such an instrument, though valid upon its face, was in reality given with the design or intent on the part of the debtor of fraudulently disposing of his property, some other evidence must be given than that the assignor had previously obtained goods upon credit by false representations respecting his solvency, and had preferred creditors in the assignment, and that there was a defect in the notary's certificate of the acknowledgment.

LOUIS TIM et al. v. C. H. SMITH; THOMAS BOYD et al. v. C. H. SMITH.

MOTION by subsequent attaching creditors to vacate attachments granted because the goods were obtained by defendant by means of fraudulent representations, and the defendant thereafter made a general assignment with preferences, and that such assignment was fraudulent because of a defect in the acknowledgment.

Blumenstiel & Hirsh, for the motion.

Otto Horwitz, opposed.

DALY, C. J.—If the assignment was not duly acknowledged, and was consequently ineffectual under the statute as an assignment for the benefit of creditors (*Cook v. Kelley*, 14 Abb., 466; Laws of 1877, p. 543), it does not follow from that circumstance that there was that fraudulent assignment or disposition of property that will authorize the issuing of an attachment. The instrument is, upon its face, a good and valid assignment, and no presumption of fraud would arise from the mere fact of a defect in the form of the certificate of the acknowledgment, which was evidently a clerical error on the part of the notary who gave the certificate. It would have been a good and valid assignment if the notary had, in his certificate, which was written immediately under the assignment, referred to the instrument as the one acknowledged before him. He

Tim et al. v. Smith ; Boyd et al. v. Smith.

evidently meant to do so by using the words "the same," but omitted to mention the instrument as the one meant by "the same."

All there was in addition to this in the affidavit upon which the attachment was granted was that the debtor had, about three months before he made this assignment, induced the plaintiffs to give him credit by representing that he was solvent and was worth thirty thousand dollars over and above all his debts and liabilities, which representation, it is averred, was false and fraudulent, and that relying upon the truth of his statement, the plaintiff continued to sell him goods upon credit until within a few days of his assignment. It is assumed from this that an assignment thereafter, for the benefit of creditors, giving preferences, was presumptively fraudulent, which does not necessarily follow. A man may obtain credit by false representations in respect to the state of his affairs, and yet thereafter honestly make such an assignment. The assignment was evidently duly acknowledged, and, if the notary had drawn his certificate correctly, the assignment would not be regarded as a fraudulent disposition of property simply because the assignor had previously obtained goods upon credit by false representations respecting his solvency and had preferred certain creditors in the assignment (*Talcott v. Rosenthal*, Ante 367, 22 Hun, 573; *Milliken v. Dart*, Sup. Court, 1st Dep't, October Gen. Term, 1881); nor will it in this case because there was a defect in the notary's certificate of the acknowledgment. There must be some evidence in addition to this from which the legal conclusion can be drawn that the instrument, though valid on its face, was in reality given with the design and intent, on the part of the debtor, of fraudulently disposing of his property.

The statement in the deputy sheriff's affidavit—that he does not now, and did not when the attachment was placed in his hands, hold any levy upon any property under the attachment, and that no lien whatever has been acquired upon any property under the attachment—is contradicted by the certificate and notice given by him, on the 11th of April, 1882, to the as,

McCloskey v. Stewart et al.

signee, that he particularly attached moneys in the assignee's possession which he held as assignee of the defendant Smith.

The application of the subsequent attaching creditor, to set aside the prior attachment as improperly allowed, must therefore be granted.

NEW YORK COMMON PLEAS—SPECIAL TERM.

APRIL 18, 1882.

A creditor's bill will lie to reach personal as well as real property claimed to have been transferred by a judgment debtor in fraud of his creditors; and where the property that can be reached is machinery, tools, etc., such new tools and machinery as have been purchased for the purpose of supplying waste of ordinary wear and tear are properly included.

JOHN McCLOSKEY v. HENRY STEWART et al.

Robert S. Green and *Frank J. Dupignac*, of counsel for plaintiff.

Edward H. Hobbs, *E. A. S. Mann* and *J. W. Perry*, of counsel for defendants.

VAN BRUNT, J.—This is a creditor's bill filed to reach certain property claimed to have belonged to one Henry Stewart and by him transferred in fraud of his creditors. The evidence shows that prior to January 18, 1879, the defendant, Henry Stewart, for many years had been a manufacturer of sewing machines in the City of New York, and was at that date in the possession of certain tools, fixtures, and machinery with which he was carrying on said business; that on the 19th of November, 1878, a judgment was obtained against said Henry Stewart by the plaintiff for nine hundred and ninety-two dollars and eighty-eight cents, and which judgment also established the rights of the plaintiff to a share in the profits arising from the use of a certain device which Henry Stewart was using in his business as a sewing-machine manufacturer.

Execution upon this judgment having been stayed, on the

McCloskey v. Stewart et al.

17th of January, 1879, such stay was vacated, and on the 18th of January, 1879, the certificate of incorporation of the Henry Stewart Manufacturing Company was filed, and it took possession of all the machinery, tools, and fixtures, and machines manufactured and in course of manufacture, book accounts and good will which had belonged to Henry Stewart, or with which he had been carrying on business.

The only trustees and incorporators of said company were the said Henry Stewart, Frances Stewart, his wife, and Beattie Mills, his daughter. The capital stock of said company was to be fifty thousand dollars, and all that was issued was issued to the wife of said Henry Stewart and to his daughters, with the exception of one thousand and five hundred dollars, which was issued to the said Henry Stewart.

The Henry Stewart Manufacturing Company, under the presidency of Henry Stewart and under his direction and sole control, carried on business until August of 1880, when a new corporation was formed by Henry Stewart, Erastus Crawford, and William Niemann, the nominal capital being two hundred and fifty thousand dollars, the Henry Stewart Manufacturing Company transferring to the Stewart Manufacturing Company the same property with which it had commenced business, including such new tools and machinery as had been bought to replace those which had been worn out in the course of the business; and issued stock to the amount of one hundred and fifty thousand dollars in payment therefor to the stockholders of the Henry Stewart Manufacturing Company, and such stock was issued as follows: one hundred thousand dollars to Frances Stewart; forty-nine thousand dollars to Beattie Mills, and one thousand dollars to Henry Stewart. No money was paid upon this transfer; neither was any cash put in the business, with the exception of two thousand dollars contributed by William Niemann, and all the stock that was issued amounted to one hundred and fifty-six thousand six hundred dollars.

On the 29th of July, 1881, the plaintiff recovered a judgment against Henry Stewart upon said contract above mentioned for thirteen thousand two hundred and twelve dollars

McCloskey v. Stewart et al.

and eighty-four cents, and an execution issued to the Sheriff was returned unsatisfied.

The defendants claim that no ownership in the property transferred to the Henry Stewart Manufacturing Company has been shown to be in Henry Stewart, and, if there was, the property transferred being personal property, a creditor's bill will not lie to reach it. Various authorities have been cited by the defendants to support the latter proposition, which, although it may seem to be established by certain dicta, has never been sustained by any direct decision; and in the only decisions where the question has come up with reasonable directness the contrary position has been held. The result of a rule such as has been claimed upon the part of the defendants to have been established in the case of a creditor who was unable to indemnify the Sheriff would deprive him of every opportunity that he might have to attack a fraudulent conveyance. If the judgment debtor should be so fortunate as to have a creditor who was not able to indemnify the Sheriff in order that he might compel him to make a levy, such debtor might make any transfer of his property, no matter how fraudulent, and the judgment creditor would be remediless.

In the case at bar, transfers have been made of the property in question. The property is claimed to have changed possession, and it is for the purpose of establishing the fraudulent character of the conveyances of this property that this action is brought.

It is also urged upon the part of the defence that the evidence in this case shows that the property in question prior to this transfer to the Henry Stewart Manufacturing Company was sold at auction under a chattel mortgage. It is true that the witness Snyder so testified in answer to a question which did not call for such a response. A motion was at once made by the counsel for the plaintiff to strike out the testimony in regard to the chattel mortgage upon the ground that the mortgage itself and the person who conducted the sale were the best evidence. The ruling of the Court was that it would

McCloskey v. Stewart et al.

allow the evidence to stand, and if testimony was not produced which would sustain the evidence given, it should fall.

The case is entirely barren of an evidence of the existence of any chattel mortgage. There is not the slightest evidence that any sale was ever made under any chattel mortgage; there is not the slightest evidence by what authority this pretended sale was made, and the case is entirely barren in testimony as to who purchased upon any such sale. By this pretended auction sale under a pretended chattel mortgage (because, in view of the circumstances of the case, if such chattel mortgage existed, if such sale had taken place under the mortgage, the defendants would have undoubtedly proved it) Henry Stewart's property upon the eve of a judgment, in the face of a large unliquidated claim, is sold to somebody, to whom we are not informed or at what price. I say it was Henry Stewart's property, because under the evidence in this case, he being shown to be in possession of it, shown to have carried on business with it, the presumption would be that it belonged to him, unless some evidence to the contrary was shown, especially in view of the fact that shortly prior to this time Henry Stewart had sworn that he was worth fifty thousand dollars over and above all his debts and liabilities, and he is not shown to have been possessed of any other property. There is not the slightest evidence that the persons to whom the stock of the Henry Stewart Manufacturing Company was issued ever acquired by such sale the slightest interest in the tools and machinery which it is claimed were sold at such pretended sale. There is no evidence as to any transfer by Henry Stewart of the book accounts to anybody for any consideration, and yet they all passed into the hands of the Henry Stewart Manufacturing Company, and stock is issued to the family of Henry Stewart for such book accounts as well as for such tools and machinery.

There does not seem to be the slightest particle of evidence which can possibly sustain the good faith of such a transaction.

Upon the evidence as it stands, it is one of the most slovenly attempts to cover up an alleged fraudulent transfer that has

McCloskey v. Stewart et al.

ever come under my observation. There is not a scintilla of evidence to show the slightest good faith upon the part of anybody connected with the transaction.

After this pretended disposition of the property, Henry Stewart carries on the business just as before, has the sole control of it—to be sure his wife and daughter draw money out of the business as though it was a copartnership and not a corporation, and after they had received this money, without any authority from the corporation, Henry Stewart, an insolvent, kindly consents to assume the burden of their responsibilities, the amounts are charged to him, and the accounts of the wife and daughter are balanced.

As to the transfer to the Stewart Manufacturing Company there is no more evidence of good faith than existed in the transfer to the Henry Stewart Manufacturing Company. No money passed, not a dollar was paid, except, perhaps, the paltry two thousand dollars contributed by Niemann—to be sure, the trustees were different—with the exception of Henry Stewart, and the stock was increased; but, as usual, the only persons that got the stock were Henry Stewart and his family—Henry Stewart receiving a mere nominal amount of the one hundred and fifty thousand dollars issued and his family receiving the balance. Some six thousand and six hundred dollars worth in stock seems to have been issued to other people who were creditors, some of whom were creditors of the corporation, and one of whom—Niemann—seems to have put in the only cash that ever graced any one of these transfers.

Henry Stewart knew of the fraudulent character of the transfer to the Henry Stewart Manufacturing Company, and he is president of the new corporation and knew perfectly well how fraudulent this second transfer was.

There is no direct evidence going to show that the two other trustees were acquainted with the fraudulent character of this arrangement, but they seem to have been unwilling to go upon the stand and testify as to their good faith, and in view of the suspicious circumstances attending the whole business, it must be assumed that such failure to show their good

McCloskey v. Stewart et al.

faith was because they did not dare to undergo an examination as to the circumstances attending these transactions.

It is claimed that the creditors of the new corporation will lose their security for their debts in case the plaintiff in this action should be allowed to succeed.

I fail to see the force of such an argument. It applies to every transfer of this description where a party fraudulently transfers his property for the purpose of escaping a liability which he anticipates, although it has not ripened into judgment; and where parties give credit to a fraudulent transferee, upon the faith of this apparent title to the property so fraudulently transferred, it certainly is no greater hardship to have to lose their debt than it would be for the creditor to lose his claim upon the property transferred because of such fraudulent transfer.

It is suggested that the only property that can be reached in this case is the machinery, tools, etc., which were in existence at the time of the first transfer. This may be true as far as the manufactured goods or goods in the process of manufacture may be concerned, but it does not apply to such new tools and machinery as may have been purchased for the purpose of supplying the waste of ordinary wear and tear. The parties in possession have had the benefit of the machinery and tools, have worn them to a certain extent in their business, they have had the benefit of such waste, and there is no reason in law or in equity why the repairs which may have been made to supply such waste should not follow the property itself. .

As well might it be said in the case of a fraudulent transfer of an engine, while in the possession of a fraudulent transferee, the piston rod of which is broken, and a new one was supplied, that the judgment creditor, when he gets possession of the engine, would not be entitled to take with it the new piston rod which had been placed there to replace the one which had been broken. Or suppose a ship had been transferred fraudulently, and when in the possession of the fraudulent transferee some new planks had been put upon her, it could equally well be claimed that the creditor could not take those planks with the ship, but that they must be removed.

Steinlein, Assignee, v. Halstead.

Where a fraudulent transferee mingles his own property with that which he has so fraudulently received, he cannot claim that the property so mingled shall subsequently be assorted and laid aside for the payment of his creditors. (*Hooley v. Gieve*, 82 N. Y., 625; Manuscript opinions in Court of Common Pleas.)

The plaintiff, therefore, is entitled to judgment with costs and an extra allowance. Findings of fact to be settled upon two days' notice.



SUPREME COURT—WISCONSIN.

MAY 10, 1881.

That part of Sec. 1697, R. S., which requires the assignee to affix his certificate to the inventory of assets and list of creditors is directory only, and such certificate is not a condition precedent to the taking effect of the assignment, and a failure to affix the same before the filing of such inventory and list will not invalidate the assignment.

*AUGUSTUS STEINLEIN, Assignee, Appellant, v.
CHARLES HALSTEAD, Respondent.*

THE facts appear sufficiently in the opinion.

*Cameron, Losey & Bunn, and F. J. Fuller, for appellant.
Howe & Tourtellotte for respondent.*

ORTON, J.—The vital question in this case is whether the assignment which was offered as the evidence of the plaintiff's title to the property is void on account of the omission of the plaintiff as assignee to affix his certificate to the list of creditors, as required by Sec. 1697, R. S., before the filing of such list in the office of the clerk. That Section provides that: "Within ten days after the execution of the assignment the assignor shall also make and file in the office of said clerk a correct inventory of his assets and a list of his creditors, stating the place of residence of each such creditor and the amount due to each, which inventory and list shall each be

Steinlein, Assignee, v. Halstead.

verified by his oath, and have affixed a certificate of the assignee that the same is correct, according to his best knowledge and belief; and a failure to make and file such inventory and list shall render such assignment void, but no mistake therein shall invalidate such assignment or affect the right of any creditor."

It is assumed by the learned counsel of the respondent: 1, that this Section in terms requires that the oath and certificate therein mentioned should be made and the certificate affixed before the filing of the inventory and list, and that a failure to do so renders the assignment void; and, 2, that the statute in this respect is mandatory, and a strict performance of this requirement is a condition precedent to the taking effect and validity of the assignment. The first point is one of construction, and the true meaning and intent of the provision must be ascertained, if possible, from the language itself in its ordinary use, and the relations which the words bear to each other in the formation of the sentence according to generally accepted rules. The controversy is in relation to the use and meaning of the word "such" in that part of the sentence, "and a failure to make and file such inventory and list shall render such assignment void."

It appears to us that the most natural and reasonable, as well as the most grammatical construction of the word *such* as here used in reference to its antecedent, is that it refers only to a correct inventory of assets and a list of creditors, without any reference whatever to the oath of the assignor or the certificate of the assignee:

1st. Because the oath and certificate are not constituent parts of the inventory and list, but are extraneous and distinct from them, and are merely the verification and certificate of them, and the reference is only to the inventory and list as such, and nothing more. They do not in any sense affect the essential qualities of character of the inventory or list, or make them more correct and perfect than they are inherently so. This reference is to these two specific subjects or things, and to nothing else, and it should not be extended to embrace any-

Steinlein, Assignee, v. Halstead.

thing more than what was certainly within its terms. If the language, "such inventory and list," was intended to have the qualification "so verified and certified," such an important qualification should be, and probably would have been, clearly expressed.

2d. This is a reasonable and natural construction, and may as well be made as the other, to say the least of it, and according to an obvious rule of interpretation that construction should be adopted which will not increase or extend the causes of forfeiture, or which in this case would render the assignment void.

3d. The language, "and a failure to make and file," clearly indicates that the failure spoken of is solely that of the assignor, and limits such failure to the making and filing alone. These are acts which can be done only by the assignor personally. He is required, first, to make a correct inventory and list of his creditors, and, secondly, to file the same. This he has done, and in so doing he has strictly complied with the requirement of the statute. It is the failure of the assignor to do these two particular acts which he is required personally to perform which renders his assignment void. Rendering his assignment void is the penalty affixed to his own failure to perform these acts. This plain and simple language cannot be extended by construction to embrace the failure of the assignee to affix his certificate to the inventory and list so to be made and filed by the assignor.

4th. The language of the section immediately following carries out this construction, "but no mistake *therein* shall invalidate such assignment," etc. Here the word *therein* has precisely the same reference of the word *such* as used above, and it is admitted by the learned counsel of the respondent, and unquestionably true, that this word refers only to the inventory and list as such, without embracing the verification and certificate. Adopting the same language in both cases would not change the sense, as if it read "but no mistake (in such inventory or list) shall invalidate," etc. The other construction would embrace a mistake in affixing or by not affixing the

Steinlein, Assignee, v. Halstead.

certificate to the list, and would lead to the same result, and the failure by mistake to affix the certificate would not invalidate the assignment, but such a construction, as we have seen, cannot be sustained. We must, therefore, hold that the statute does not in terms declare the assignment void for the failure of the assignee to affix his certificate to the list before its filing.

2. The proposition that this requirement is mandatory, and must be strictly performed in order to render the assignment valid, is equally untenable.

Whether this particular requirement is mandatory or directory only must be determined by the usual rules for determining the question in all cases where the intention of the Legislature to make it mandatory or otherwise must be ascertained from the nature and relations of the act to be done. These rules have been laid down in cases in this court as explicitly and correctly as in any cases to be found, and are as follows: "That where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before—no presumption that by allowing it to be so done it may work an injury or wrong—nothing in the act itself, or other acts relating to the same subject-matter, indicating that the Legislature did not intend that it should rather be done after the time prescribed than not to be done at all; then the courts assume that the intent was that if not done within the time prescribed it might be done afterward" (*State ex rel. Cothren v. Lean*, 9 Wis., 292); and again, "Directory statutes are such as are not of the substance of the thing provided for." (*Mendel v. Durbin*, 26 Wis., 390.)

In respect to these requirements, the essential thing to be done, or "the substance of the thing provided for," is the making and filing of a correct inventory of assets and list of creditors within ten days after the execution of the assignment. The creditors are concerned and interested in this alone, and it is essential that both the inventory and list should be as perfect and correct as possible, and be filed within the time, for the information of all concerned. Neither the

Steinlein, Assignee, v. Halstead.

oath of the assignor nor the certificate of the assignee could make either of them more complete or correct, or be of any conceivable benefit to any one concerned. The verification might be a sanction or pledge binding upon the conscience of the assignor, and the certificate of the assignee, "according to his best knowledge and belief," might possibly afford some slight evidence of good faith in accepting the trust. The assignee cannot be presumed to have any actual and personal knowledge that the inventory of assets was correct, or that the list of creditors stated correctly the place of their residence and the amount due to each, more than the creditors themselves. Neither the oath nor certificate is much more than a mere formality, and both may as well be made after as within the ten days, so far as any practical effect or beneficial use is concerned. Here there is no pretence, in fact, that the inventory and list are not correct. This comparatively unimportant and non-essential requirement comes most clearly within the above rules as a merely directory provision of the statute, and its performance within the time named is not essential to the validity of the assignment.

Nor must the maxim, *expressio unius exclusio alterius*, be ignored or underrated in the interpretation and construction of this statute. There are many of the requirements of this statute whose performance is essential to the validity of the assignment, and made so in express terms, but this, as we have seen, is not one of them. This creates a very strong presumption that the Legislature did not intend to make a failure in this respect invalidate the assignment. This principle is recognized in respect to statutes relating to assignments, as to other matters, by many authorities, among which are *Hardman v. Bowen* (39 N. Y., 196); *Lewis, Governor, v. Stout* (22 Wis. 235); *Hutchinson v. Brown* (33 Wis., 464); *Klauber v. Charlton* (1 Am. Ins. R., 283; 45 Wis., 600); and in a late case of *Hark v. Gladwell* (49 Wis., 172), it was not only held that the statute requiring the order for changing a road, together with the award of damages, to be filed with either the county or town clerk within ten days from the making of such order was

Lowenstein et al. v. Flaurand et al.

directory merely, and the present Chief Justice mentions as one of the reasons for so holding, that another provision of the statute declared that on failure to file a certain order, together with the award of damages made by the supervisors, within the time specified, "They shall be deemed to have decided against the application," and uses the following language: "But no such language is found in Section 118, and this shows that the Legislature did not intend to make the filing of the order and award within ten days essential to the validity of the proceedings."

In this case, the failure of the assignee to affix his certificate to the inventory and list being the only objection made to the validity of the assignment, it follows that the assignment should have been allowed as sufficient evidence of the plaintiff's title to the property, and the plaintiff ought to have recovered in the action.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

COURT OF APPEALS—NEW YORK.

NOVEMBER, 1880.

An assignment for the benefit of creditors may be made by an attorney constituted for that purpose, and vests the assignee with the title to the assigned property.

*SIEGFRIED LOWENSTEIN et al., Appellants, v.
AUGUST FLAURAND et al., Respondents.*

APPEAL from judgment of Supreme Court, General Term, affirming a judgment in favor of defendants.

The action was brought to set aside an assignment executed by an attorney acting for two of the defendants, debtors.

The facts appear fully in the opinion.

Rastus S. Ransom, for appellants.

Lowenstein et al. v. Flaurand et al.

One copartner cannot, by virtue of his power as such copartner, make an assignment of the copartnership effects to a trustee for the benefit of the creditors of the firm. (*Welles v. March*, 30 N. Y., 344; 19 Abb., 32; 28 Barb., 593; 3 Sandf., 284; 8 Bosw., 495.) An assignment for the benefit of creditors to be valid must be the personal act of the assignor. It cannot be done by attorney. (*Hardman v. Bowen*, 39 N. Y., 196; *Cook v. Kelley*, 14 Abb., 466; 12 id., 35; *Adams v. Houghton*, 3 Abb., N. S., 46; 50 Barb., 440; *Britton v. Lorenz*, 45 N. Y., 51.) The Act of 1860 (Chap. 340) is in derogation of the common law, and every requisite of it, therefore, must be strictly complied with. (6 Wheat., 119; 4 id., 77; 7 Cow., 88; 7 Wend., 148; 20 id., 249; 3 N. Y., 438; 77 id., 1.)

Otto Horwitz, for respondents.

An assignment of partnership property for the benefit of the former creditors, executed by one of the partners, is valid where power to make such assignment can be implied from circumstances. (*Welles v. March*, 30 N. Y., 344, 351, 353; *Fisher v. Murray*, 1 E. D. Smith, 341; 2 Hilton, 531; *Ninth Nat. Bank v. Sackett*, 2 Daly, 395; *Palmer v. Meyers*, 43 Barb., 509; *Baldwin v. Tynes*, 19 Abb. Pr., 32; *Darrow v. Bruff*, 36 How. Pr., 479.)

ANDREWS, J.—The first Section of the Act (Chap. 340 of the Laws of 1860) declares that every conveyance or assignment made by a debtor of his estate, in trust for creditors, “shall be in writing, and shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and the certificate of such acknowledgment shall be duly endorsed upon such conveyance or assignment before the delivery thereof to the assignee or assignees therein named.”

In *Hardman v. Bowen* (39 N. Y., 196), it was held that the provisions of this Section were mandatory, and that an assignment not acknowledged by the assignor was void as against attaching creditors, although the assignment had been deliv-

Lowenstein et al. v. Flaurand et al.

ered to the assignees, and they had taken possession of the assigned property prior to the levy under the attachment. The court regarded the statute as establishing a new rule upon the subject of assignments, and that by its true construction the acknowledgment of an assignment was an essential prerequisite to the vesting of the title to the assigned property in the assignee as against creditors.

The plaintiffs in this case are judgment creditors of the firm of August Flaurand & Son, which was a firm doing business in the city of New York, composed of August Flaurand and Eugene Flaurand. In October, 1876, Eugene Flaurand left this country for France, but before leaving, and in anticipation of pecuniary embarrassments of the firm, he executed under his hand and seal a power of attorney, duly acknowledged, appointing Nathan Metz his attorney, among other things, to sign, seal, execute, acknowledge, and deliver a general assignment of his estate, and to join with his copartner in signing, sealing, executing, acknowledging, and delivering a general assignment of the firm property to an assignee for the benefit of creditors. On the 8th of November, 1876, an instrument of assignment, purporting to be made between August Flaurand and Eugene Flaurand of the first part, and Adolphe Salmon of the second part, assigning to the latter all the joint and separate property of the assignors, in trust for creditors, was executed by August Flaurand in person, and by Nathan Metz, in the name of Eugene Flaurand, as his attorney. The assignment was before delivery duly acknowledged before a proper officer. A certificate of acknowledgment was endorsed on the assignment, certifying that the instrument was acknowledged by August Flaurand in person, and by Nathan Metz as attorney for Eugene Flaurand, by virtue of the power of attorney above referred to, which was annexed to the certificate, and that the persons making the acknowledgment were known to the certifying officer.

The decision of this appeal depends, we think, upon the question whether, under the Act of 1860, an assignment in trust for creditors, executed in the name of the debtor by an

Lowenstein et al. v. Flaurand et al.

attorney duly constituted for that purpose, and acknowledged by him, is well executed so as to vest in the assignee the title to the assigned property. This question was not involved in *Hardman v. Bowen*. The assignment there was executed by the debtor in person, and the only point decided was that, under the Act of 1860, an assignment by a debtor, in trust for creditors, not acknowledged, was void as against creditors.

It is a general rule that when a man has power as owner or principal to do any act or thing in his own right, he may do it by another. (Paley on Agency, Sec. 1.) The most solemn deeds and contracts are constantly made and executed through agents duly constituted and acting for their principals. One may appoint an agent to convey his lands (1 R. S., 738, Sec. 137) or to sell or transfer his personal property. The authority may be created by deed, simple writing, or parol, according to the nature of the act to be done, and when exercised in conformity with the power the act of the attorney is in law the act of the principal. Independently of the Act of 1860, it is clear that an assignment by a debtor of his property in trust for creditors executed in his name by an attorney duly constituted would be effectual to vest the title to the assigned property in the assignee. An assignment in trust for the benefit of creditors is but a conveyance of the property of the assignor for a special purpose, and there is nothing in the nature of the transaction which takes it out of the general rule that the owner of the property may constitute an agent to do any act in respect thereto which he might lawfully do in person. There are exceptions to this rule founded upon the nature of the act to be done, or upon affirmative statutory provisions. One cannot make a will by attorney. A married woman authorized to convey her lands only by deed duly acknowledged by her upon a private examination, cannot acknowledge by attorney. Other instances of like character are referred to in the opinion of ALLEN, J., in *The People v. Smith* (45 N. Y., 783), where an act authorized by statute must, from its nature, or the necessary construction of the statute authority, be done in person. So, also, a contract may be of such a character that it

Lowenstein et al. v. Flaurand et al.

can only be performed in person by the party bound thereby, and where performed by an agent, unless accepted by the other party, would not be a compliance with the obligation.

The Act of 1860 does not in terms require that an assignment shall be executed or acknowledged by the assignor in person, and it cannot, we think, be construed as excluding by implication the execution and acknowledgment by an attorney. The requirement that it should be in writing was inserted to prevent the creation of parol trusts for the benefit of creditors, and the purpose of this requirement is satisfied by a written assignment executed by an attorney duly authorized; and the provision that it shall be acknowledged and certified was rendered necessary to carry out the requirement of the sixth section, that every assignment made under the provisions of the Act shall be recorded in the county of the debtor's residence.

There is nothing in the language of the Act of 1860 which indicates an intention on the part of the Legislature that an assignment must be the personal act of the assignor, or from which it can be assumed that the Legislature intended, in respect to assignments by a debtor in trust for creditors, to abrogate the common law rule which permits the owner of property to convey it through the instrumentality of an agent. The fact that by the second section the debtor is required to make an affidavit to the schedule within twenty days after the assignment does not, we think, authorize the inference that the debtor must sign and acknowledge the assignment in person. The amendment of 1874 (Chap. 600) declares that the omission of the debtor to make the schedule and affidavit shall not render the assignment invalid or ineffectual, and this was the construction of the statute before the amendment was passed. The requirement that the debtor should himself verify his inventory is not inconsistent with the existence of the power to make the formal instrument of assignment by procuration.

It is claimed that August Flaurand was authorized by parol by Eugene Flaurand, before the latter left the country, to make a general assignment of the firm property for the benefit of creditors, and that, independently of the execution

Macungie Savings Bank v. Bastian.

of the assignment by the attorney for Eugene, the execution and acknowledgment thereof by his copartner was sufficient. There is some difficulty in maintaining this view, for the reason that August Flaurand did not assume to make the assignment in the name of the firm. He acted for himself, and his copartner was represented in the transaction by his attorney, Metz.

But upon the ground first stated we are of opinion that the judgment should be affirmed.

All concur.

SUPREME COURT—PENNSYLVANIA.

MARCH 14, 1881.

A stockholder of an insolvent bank can be made to pay to the assignee his unpaid subscription, and he has no right to set off against such claim his claim against the bank as depositor.

MACUNGIE SAVINGS BANK, to use of CHARLES W. COOPER, Assignee, &c., v. REUBEN BASTIAN.

ERROR to the Court of Common Pleas of Lehigh County.

Assumpsit, by the Macungie Savings Bank to the use of Charles W. Cooper, assignee of said bank, against Reuben Bastian, to recover unpaid assessments upon a stock subscription.

The plaintiff, under a rule of court, filed a statement setting forth that the Macungie Savings Bank was duly incorporated on the 28th of March, 1867; that at the opening of the subscription book Bastian subscribed for one hundred shares of stock of the par value of twenty dollars per share, paying on account therefor five dollars per share, and that he duly received the certificate. That on the 29th of April, 1878, the bank made an assignment to the use of plaintiff, and the assets not proving sufficient to pay the debts, the board of trustees, by resolution dated September 23, 1879, made an assessment of fifteen dollars per share, to recover which amount upon each of defendant's shares this suit was brought.

Macungie Savings Bank v. Bastian.

The defendant filed an affidavit of defence alleging, *inter alia*, that on the 25th of March, 1877, and the 7th of May, 1877, he became a depositor in the bank in the several sums of forty-two hundred dollars and two hundred and twenty-five dollars for which he received and still held certificates of deposit; that said sums were still due and unpaid; and that he claimed to set-off these sums against the amount due by him for his stock subscription.

The court (ALBRIGHT, P. J.) discharged a rule for judgment for want of a sufficient affidavit of defence.

The plaintiff took this writ, assigning for error the action of the court in refusing to enter judgment for want of a sufficient affidavit of defence.

C. J. Erdmann, for plaintiff in error.

Henninger & Dewalt, for defendant in error.

STERRETT, J.—The capital stock of a corporation, whether fully paid or partly outstanding in the hands of subscribers thereto, is undoubtedly a trust fund for the benefit of its creditors. (*Germantown Railway Co. v. Fidler*, 10 P. F. Smith, 131; *Wood v. Dammer*, 3 Mason, 308; *Mann v. Pentz*, 3 Comstock, 422.) While such unpaid subscriptions pass, as assets, to the assignee under a voluntary assignment for the benefit of creditors, and the directors of the insolvent corporation may be required to make such calls on subscribers to the stock as may be necessary to enable him to collect the same, they still retain the impress of trust funds, and must go into the hands of the assignee intact, for the purpose of distribution among those for whose benefit they were intended. In this respect they differ from ordinary choses in action belonging to the assignor at the date of the assignment. Against the latter legitimate claims of set-off may exist; and what remains, after deducting the same, is all that can properly be considered a part of the trust fund.

The demand against defendant in this case is not grounded on business transactions between him and the bank since its or-

Macungie Savings Bank v. Bastian.

ganization. It originated in the very creation of the bank of which he was one of the incorporators. As a condition precedent to the granting of letters of incorporation they were required, by the sixth section of the charter, "to raise and form a capital of not less than five nor more than fifty thousand dollars in shares of twenty dollars each," for the security of depositors. The defendant subscribed for one hundred shares of the capital stock thus required, and paid twenty-five per cent. thereof. By resolution of the board after the assignment, the remaining seventy-five per cent. was "called in for the liquidation of the indebtedness of the corporation." He refused to pay in obedience to the call, and when suit was brought by the assignee in the name of the bank to recover the balance due and owing by him on his subscription, his defence was that the bank was indebted to him, as a depositor, in a much larger sum, and therefore he should not be compelled to pay. If such a defence were entertained, the effect would be to withdraw from depositors and other creditors of the insolvent bank a portion of the very fund which was specially provided for the common benefit of all alike, and apply it to the sole benefit of the defendant, who, at best, has no better right thereto than other depositors. If every delinquent subscriber to the capital stock could thus pay his subscription, what would become of other depositors and creditors of the insolvent bank? It is not difficult to see what a perversion it would be of the trust fund, and to what gross injustice it would necessarily lead. From the fact that the directors called in the whole of the outstanding subscriptions for the purpose of liquidating the indebtedness of the bank we have a right to assume that it is all required for that purpose. If defendant's indebtedness to the bank at the date of the assignment had been founded on an ordinary business transaction, such as making or endorsing a note, he might, with some show of reason, insist on setting up by way of defence a counter claim as depositor. This would bring him within the principle of *Jordan v. Sharlock* (1 Am. Ins. R., 48, 3 Norris, 368).

In *Sawyer v. Hoag, assignee* (17 Wall., 610), it was held

Macungie Savings Bank v. Bastian.

that a stockholder indebted to an insolvent corporation for unpaid shares cannot set off against the trust fund for creditors a debt due him by the corporation; that the fund arising from such unpaid shares must be equitably divided among all creditors. That case, it is true, arose under the National Bankrupt Act; but so far as the principle now under consideration is concerned, the right of set-off and rule of distribution under that Act do not materially differ from our voluntary assignment law.

The defence set up in this case derives no support from the principle involved in *Fox's Appeal* (37 Legal Intell., 323). The fund for distribution there included proceeds of outstanding subscriptions to the capital stock of the Kutztown Savings Bank, which had been collected by the assignee. The whole fund was insufficient to pay depositors, who claimed that as a preferred class they were entitled to the fund for distribution, to the exclusion of other creditors, and if not entitled to the entire fund, they had at least an exclusive right to that portion of it which represented capital collected by the assignee; but it was held that the depositors as a class had no exclusive right to the whole or any particular portion of the fund.

As the case was presented to the court below, we are of opinion that the plaintiff was entitled to judgment for want of a sufficient affidavit of defence.

It is ordered that the record be remitted to the court below, with instructions to enter judgment against the defendant for fifteen hundred dollars with interest from the time the same was due and payable according to the call, unless other legal or equitable cause be shown to said court why such judgment should not be entered.

Bush v. United States.

UNITED STATES CIRCUIT COURT—DISTRICT OREGON.

NOVEMBER 8, 1882.

There must be in some way an assignment of the debtor's property to a third party for distribution among his creditors before Section 3466 of the U. S. Revised Statutes can be invoked, and then it acts directly upon the assignee, by requiring him to pay the claim of the United States first, or making him personally liable unless he does it.

BUSH v. UNITED STATES.

BILL of review.

Geo. H. Williams, for plaintiffs.*James F. Watson*, for defendants.

DEADY, J.—This case was before the court on October 2d, on a motion of the district attorney to dismiss the bill of review for want of jurisdiction. The motion having been denied, the defendant demurred, and the cause was argued and submitted on the bill and demurrer.

The first question for consideration is, Had the United States, upon the facts stated and found, a right of priority of payment out of the property of Griswold on January 6, 1879, by virtue of Section 3466 of the Revised Statutes, which reads:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall first be satisfied, and the priority hereby established shall extend as well in cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate or effects of an absconding, concealed, or absent debtor are attached by process of law; as to cases in which an act of bankruptcy is committed."

At this date it appears that Griswold confessed judgments to sundry persons for an aggregate sum, which, together with his indebtedness to the United States and sundry mortgage

Bush v. United States.

creditors, far exceeded the value of his assets, and that said judgments, with the exception of the one to plaintiffs herein for three hundred and forty-eight dollars and eighty-two cents, were based upon fictitious claims and confessed with the intent to hinder, delay, and defraud the United States in the collection of a claim against Griswold then in suit in this court, and upon which it obtained judgment against him on July 30, 1879, for thirty-five thousand two hundred and twenty-eight dollars, and two thousand eight hundred and twenty-one dollars and sixty cents costs and disbursements. Upon this state of facts it was tacitly admitted by counsel and assumed by the court on the hearing of the original case that the priority of the United States attached to the property of Griswold subject to the liens of the valid mortgages thereon. It is admitted that the statute giving the priority of payment was not applicable to this case, unless Griswold made a voluntary assignment of his property; and it is also admitted that he had not done so, unless the confessing of these judgments amounted to such assignment.

There is no doubt but that the effect of these judgments by means of the lien they carried when docketed, unless set aside at the suit of creditors for fraud, was practically to transfer whatever interest Griswold had in the property in question to the plaintiffs therein. But, upon further reflection and examination, I am satisfied that they did not amount to or operate as an assignment within the purview of the statute. The latter is only applicable to cases where the debtor's property, either by his death, legal bankruptcy or insolvency, has passed into the hands of an administrator or assignee for the benefit of creditors, or where the debtor himself has voluntarily made such disposition of it. It does not apply, then, to a conveyance, assignment, or transfer, by whatever means accomplished, to a real or pretended creditor or creditors, in payment or satisfaction of a debt or claim. There must be in some way an assignment of the debtor's property to a third person for distribution among his creditors before the statute can be invoked, and then it operates directly upon the assignee by requiring him to pay

Bush v. United States.

the claim of the United States first and making him personally liable therefor if he does not. (Section 3467, Rev. Stat.) The following authorities bear, with more or less directness, upon these conclusions : *U. S. v. Fisher*, 2 Cranch, 390 ; *U. S. v. Hool*, 3 Cranch, 90 ; *Concord v. Atlantic Ins. Co.*, 1 Pet., 438 ; *Beaston v. Farmers' Bank of Delaware*, 12 Pet., 132 ; 1 Kent Comm., 247 ; *U. S. v. Canal Bank*, 3 Story, 81 ; *U. S. v. McLellan*, 3 Sumn., 350 ; Conkl. Treat., 723.

It follows that so much of the decree as provided that Lot 8 in Block 10 and the west half of Lots 1, 2, 3 and 4 in Block 73 in the town of Salem shall be subject to the payment of the judgment of the United States after they have been sold on legal process from the State court, and before the entry of said judgment, upon the assumption that the priority of the United States had attached thereto prior to such sale, to wit, on January 6, 1879, is erroneous, and must be reversed and a decree entered dismissing the bill as to the plaintiffs in error.

INDEX.

ACCOUNTING.

1. In adjudicating upon the claims of an assignee, in final settlement of his accounts with the trust estate, no private agreement between him and either of his assignors is sufficient to authorize the allowance of a claim which would be unauthorized under the assignment.—*Clark v. Stanton*, 81.
2. All persons, whether they have signed releases or not, must be notified by citation to attend the settlement of the accounts of the assignee.—*In re assignment of Lewenthal et al.*, 99.
3. When an assignment becomes void because no inventory is filed within thirty days after the execution of the assignment, as required by the statute of 1877, no trust based upon the assignment as a valid instrument can be enforced.—*In re assignment of Leahy*, 162.
4. In such case the assignee cannot be called upon to account under the statute for property which came into his hands. An accounting may be had in a suit in equity.—*Ibid.*
5. A petition for the removal of an assignee in such case denied.—*Ibid.*
6. The Supreme Court has concurrent jurisdiction with the County Court to compel assignees to account under the Statute of 1877.—*The Converseville Co. v. The Chambersburg Woollen Co. et al.*, 166.
7. If creditors have been induced by the assignee to accept less for their claims than the ratable share due them, they can still be allowed to get from the assignee, on his accounting, the ratable share due them.—*In re Marquand*, 216.
8. The right of creditors of an insolvent estate to an accounting by the assignee for creditors cannot be diverted by the mere fact of a composition in bankruptcy, unless that right is in some way relinquished by the creditors, or shall be divested by the order of the Court in Bankruptcy, as where a composition having been made and accepted, and the terms of the composition complied with, the Bankruptcy Court orders the property in the hands of the assignee to be surrendered to the bankrupt.—*In re assignment of Allen et al.*, 405.
9. The assignment preferred B. F. & Co., and the assignee paid the claim without proof at the time. The referee disallowed the amount so paid in his report upon an accounting of the assignee, because B. F. & Co. had not

proved their claim pursuant to the terms of the Assignment Act. *Held*, Error.—*In re assignment of Finck et al.*, 411.

10. Seeley made a transfer of property to one Raymond, alleged to be fraudulent as to the creditors of the former and in contemplation of an assignment for the benefit of creditors, and then made a general assignment to the same person. Thereafter a new assignee was appointed, and the first assignee was called to account by a creditor. *Held*, That on such accounting the County Judge had no power to investigate the alleged fraudulent transfer and compel the first assignee to pay over the property thus fraudulently assigned.—*In re accounting of Raymond*, 445.

See DISTRIBUTION, 2, 4; PETITION, 5, 6.

. ACTION.

See ASSIGNEE, 11, 14, 19–21, 26, 31.

AFFIDAVIT.

See DISCHARGE, 15, 16.

ANTE-NUPTIAL CONTRACT.

See HUSBAND AND WIFE.

APPEAL.

1. An appellant can only urge such objections to a judgment appealed from as affect his interests.—*Clark v. Stanton*, 81.
2. An assignee for the benefit of creditors has no such interest in the distribution between creditors as to give him a right of appeal.—*Herbst & Buchler's appeal*, 224.
3. An order vacating an order discharging an assignee and cancelling his bond, is not reviewable in the Court of Appeals.—*In re assignment of Horsfall*, 350.

See SALE, 1.

ASSETS.

1. Real estate does not pass to the assignee under an assignment of "all the goods, chattels, effects, and property of every kind, personal and mixed," of the assignor; nor can the assignee make any claim upon the proceeds thereof, after a sale and conversion by the assignor.—*Rhoads v. Blatt et al.*, 45.
2. A general assignment for the benefit of creditors passes any interest which the assignor had in goods, although not in his possession or under his control.—*Mumper v. Rushmore*, 164.
3. A delivery of the property to the assignee is not essential to the validity of a general assignment.—*Ibid.*
4. Where the sheriff has taken a debtor's goods under execution against him, and he subsequently makes a general assignment, it is valid, and will transfer the debtor's interest to the assignee therein, subject only to the lien of the execution.—*Ibid.*

5. The United States Statute (U. S. R. S., Section 3447) inhibiting "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein," does not prevent the passing of such a claim to the assignee for the benefit of creditors.—*Goodman v. Niblack*, 368.

See ATTACHMENT, 7.

ASSIGNEE.

1. Upon a petition to discharge an assignee on final accounting under the general assignment act of 1877 (Laws N. Y., Chap. 466), it must appear that claims have been advertised for, and that citations have been issued to creditors and parties interested in the bond, and there must be proof of the due service thereof.—*In re accounting of Weinboltz*, 65.
2. An original schedule of creditors is not evidence of the names and addresses of the creditors; it must appear by other evidence.—*Ibid.*
3. When a composition deed is relied upon, it must appear whether there are any creditors who have not signed it.—*Ibid.*
4. The testimony taken by a referee in such proceedings must be in writing, and subscribed by the witnesses, and returned to the court with the referee's report.—*Ibid.*
5. The failure of an assignee to give the security required of him under the general assignment act of 1860 does not invalidate the assignment, but the title passes to him in trust, if he accepts the assignment, but he cannot act under it until security is filed on his behalf as required by the statute.—*Brennan et al. v. Willson et al.*, 77.
6. Where one of several assignees (all accepting the trust) fails to qualify by giving the security as required by the statute, he cannot join with the others and convey a good title to real property so assigned to them.—*Ibid.*
7. The utmost good faith and integrity are required of an assignee in trust in the administration of his trusts, and he will not be permitted to take any advantage of his position, or information as assignee, to make advantageous bargains for himself, to the prejudice of the trust estate, or any of his *cestui que trusts*; nor, if he makes any such, will he be allowed to retain the benefits of them.—*Clark v. Stanton*, 81.
8. An assignee, under the General Assignment Acts, will not be discharged by the court except upon a proceeding for an accounting.—*In re assignment of Lewenthal et al.*, 99.
9. Where the assignors and the creditors have compromised, and the assignee seeks to be discharged, he must first advertise for claims as provided by statute.—*Ibid.*
10. The title to the assigned property vests in the assignee upon the execution of the assignment, although the assignee's bond is not filed until afterwards, but within the time required by the statute.—*Bostwick v. Burnett*, 118.
11. An assignee for the benefit of creditors deposited the proceeds of the estate in the name of the assignor, without notice to the bank of the assignment. *Held*, That he could maintain an action for the moneys so deposited.—*Greene v. The National Security Bank*, 120.

12. The fact that the assignee has not given the bond, as required by law, does not, upon an allegation that he has converted to his own use, shield him from liability to show what has become of the property which went into his hands.—*In re assignment of Farnam*, 127.
13. A voluntary assignment for the benefit of creditors is sufficient to pass title to the assignee, and enable him to enforce it as against the assignor, as well as others, even though it is made under a foreign Insolvent Act.—*Burrows v. Keys*, 140.
14. Such an assignment made in Canada may be enforced by the assignee against the assignor as to property within the United States, and trover may be maintained by the assignee against the assignor for notes detained by him after being assigned under the Canada Insolvent Law.—*Ibid.*
15. An assignment for the benefit of creditors vests the title in the assignee forthwith, although he may be ignorant of the assignment.—*The First National Bank of Newark v. Holmes et al.*, 150.
16. A trust does not fail for want of a trustee. It is valid whether the assignee ever accepts the trust or not.—*Ibid.*
17. Where, after an assignment for the benefit of creditors, a composition deed is obtained from creditors by an assignor, the assignee cannot reassign the property and be discharged from the trust on consent of some of the creditors and the assignor without a regular accounting under the statute.—*In re assignment of Horsfall*, 156.
18. The assignee's relations to the creditors are solely those created by the instrument of assignment under which he holds. He only represents them in respect to their rights and interests under the assignment, and not as to those rights belonging to them independent of its provisions.—*Fowler v. Cornish*, 184.
19. A general assignment of property by an insolvent debtor for the benefit of creditors, in conformity to the laws of the State of New York, where such debtor resided and did business, operates to transfer the right of action to recover said property to the assignee, and he may maintain an action as such assignee in the courts of any other State to collect the same. This is so, although said assignment as authorized by the laws of New York gives preference to certain of the creditors, which is not authorized by the *lex fori*.—*Fuller v. Steiglitz*, 191.
20. In case of such an assignment the law of the domicil of the assignee controls and determines what is a sufficient transfer to authorize the assignee to collect the same.—*Ibid.*
21. The principles of comity between States will allow such assignee to maintain an action in the courts of another State against one of its citizens to collect the same, notwithstanding such preferences, in the absence of any set-off, or other defence in such action, or of any lien or charge against said claim under the laws of such State by the debtor.—*Ibid.*
22. An assignee for the benefit of creditors has no right to use the trust funds in the purchase of claims against the assigned estate and he have the benefit of the profits of the transaction. If any profit is made in such manner it inures to the benefit of the creditors of the assigned estate, and the assignee, upon his accounting, can be compelled to pay it to the creditors.—*In re Marquand*, 216.

23. An assignee, under Chap. 466, Laws of 1877, as amended by Chap. 318, Laws of 1878, may be removed for misconduct or incompetency.—*In re petition of Cohn et al.*, 221.
24. Where the assignee was the adviser, counsel, and active agent of the assignor's wife in procuring a judgment in her favor against the assignor, under circumstances strongly indicative of collusion and fraud, and in causing an execution to be levied upon the assignor's property, and in causing a sale to be had thereunder five days previously to the assignment, whereby a large amount of property was disposed of, *Held*, misconduct sufficient to authorize the assignee's removal, and that, as the position and duties of the assignee as the wife's attorney and his obligations as a representative of the insolvent estate were incompatible, he was incompetent under the act.—*Ibid*.
25. Where an assignment for the benefit of creditors contained a provision that the assignees should receive "a reasonable commission or compensation for their own services in executing the trust," *Held*, That they were not entitled to be allowed the actual value of their services, but were restricted to the same commissions as are by law allowed to executors and administrators.—*In re accounting of Shaw et al.*, 244.
26. An assignee under an assignment for the benefit of creditors cannot, unless they were a fraud upon his assignor, maintain an action to invalidate transfers made by the latter in fraud of creditors.—*Fillsbury v. Kingston*, 274.
27. The assignee may purchase the interest of the vendee of the assignor's interest in foreclosure; and, provided he exercises a sound discretion, and it is for the benefit of the estate, he may complete the contracts, and carry on the unfinished business of the assignor, without the order of the court.—*Miller v. Mulford*, 293.
28. Where an assignee for the benefit of creditors has received assets, the discharge in bankruptcy, subsequently, of the assignor, does not affect the relations of the assignee and the creditors of the assignor.—*Smith v. Tighe et al.*, 344.
29. An assignee for the benefit of creditors derives all his power from the assignment. Beyond that, or outside of its terms, he is powerless and without authority, and the control of the court over his action is limited in the same way.—*In re assignment of Lewis*, 352.
30. A general assignee for the benefit of creditors has no right to make a conveyance of property until he has filed the bond required by Laws of 1860 (Chap. 348, Sec. 3); such a conveyance is void and may be set aside by creditors and by a successor of the assignee.—*Woodworth et al. v. Seymour et al.*, 376.
31. An assignee for the benefit of creditors, being a representative only of the assignor, cannot acquire a right of action which his assignor could not have had.—*Hawks v. Pretzlaff*, 389.
32. Where, upon the face of an assignment, or by proof *abundant*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against the sheriff who seeks to enforce, by execution, a judgment against the debtor.—*McConnell v. Sherwood*, 400.

33. An assignee for the benefit of creditors is only entitled to commissions on the amount that has come into his hands, and not upon the value of all the property assigned to him. Where he has received no money on which commissions can be computed, the case is not provided for by statute, and the court may, before compelling him to return the assigned property to the assignor after a composition, order a suitable and reasonable compensation as a condition of such return.—*In re assignment of Hulburt et al.*, 454.

See ACCOUNTING, 1, 4-6, 8-10; APPEAL, 2, 3; ASSIGNMENT, 14, 33; ASSETS; BANKRUPTCY, 2; BOND, 1, 2; COMPROMISE; CONTEMPT; DAMAGES; MORTGAGE, 1; PRACTICE, 4; PREFERENCE, 1; RECORD, 2.

ASSIGNMENT.

1. An assignment for the benefit of creditors devotes all the property covered by it to the creditors who have their claims allowed pursuant to the act regulating the administration of assignments, to the exclusion of those who do not.—*Lahn et al. v. Johnson et al.*, 1.
2. An assignment, which upon its face purports to have been made under the provisions of the N. Y. Revised Statutes, relating to "voluntary assignments made pursuant to an application of an insolvent and his creditors" (2 R. S., p. 16), is invalid as a conveyance of the insolvent's estate when the preliminary proceedings upon which it is based are void.—*Rockwell v. McGovern*, 59.
3. Such an assignment was only for the creating of a statutory trust for the purposes of the statute; when that failed no estate vested in the assignee, notwithstanding the mention of a nominal sum as the consideration of the assignment.—*Ibid.*
4. A debtor in failing circumstances may make an assignment of his property for the benefit of his creditors, and if fairly done, passes the title to his property to his assignee, and the same is not subject to a subsequent levy of an execution upon it against the debtor.—*Nimmo v. Kuykendall*, 106.
5. The question of fairness is one of fact for the jury, or the court sitting as a jury, and will not be disturbed when the question is properly submitted.—*Ibid.*
6. An assignment may be held valid, although it prefers certain creditors over others.—*Ibid.*
7. None of the statutes of Pennsylvania relating to assignments for the benefit of creditors require that they shall be drawn in any specific form.—*Wallace et al. v. Wainwright et al.*, 110.
8. An assignment expressed to be in payment of certain creditors named therein, *Held*, to be an assignment for the benefit of the creditors designated, and one, too, by which those creditors were preferred, and that not having been recorded within thirty days, it was void under the acts of 1818 and 1843.—*Ibid.*
9. The United States Bankrupt Act does not invalidate or affect a voluntary assignment valid under the laws of the State where no proceedings in bankruptcy are instituted.—*Bostwick v. Burnett*, 118.

10. Where preferences in assignments are allowed by the laws of a State where the assignment is made, the assignment is valid unless proceedings are taken against it under the United States Bankrupt Law upon that ground within the time required by that act.—*Ibid.*
11. An assignment for the benefit of creditors is void if it does not include the assignor's real estate and all his interest in it.—*Price v. Haines*, 137.
12. The meaning of an assignment must be gathered from the whole instrument.—*Ibid.*
13. Where an assignment was made of all one's "goods, chattels, stock, promissory notes, debts, choses in action, evidences of debt, claims, demands, property, and effects of every description, to wit: All the goods, chattels, and property now in the store lately occupied by the party of the first part (the assignor), and also certain other specified chattels and debts," *Held*, This did not include real estate, and that the assignment was void.—*Ibid.*
14. Where an assignment is made for the benefit of creditors under the Act of 1860, as amended in 1875, the failure of the assignee to give the bond, as required by the statute, does not invalidate the assignment. It was otherwise until the Act of 1874, but since the Act of 1875 the assignee is prohibited from selling the assigned property, or converting it to the purposes of the trust.—*Worthy v. Benham*, 145.
15. Where an assignment for the benefit of creditors is made by a firm whose liabilities are less than the assets, and the deed of assignment contained a clause conditioned that the assignee proceed under it, unless the indebtedness of the firm can be paid or settled with otherwise, etc., *Held*, That the assignment was made with the intent to hinder and delay creditors, and was void.—*Keovil et al. v. Donaldson*, 153.
16. A court has no power to make a new deed of assignment any more than a new contract between parties.—*Ibid.*
17. An assignment for the benefit of creditors can be impeached only for fraud in the assignment, or at the time of making it, so as to have attached to the instrument or affected its operation.—*Wilson v. Berg*, 169.
18. A voluntary assignment, at common law, by a debtor, for the benefit of his creditors, if fairly made and accompanied by possession, will prevail over executions subsequently issued, unless there be something in the recent legislation to render it void.—*Bassett v. Fahy*, 174.
19. Under the recent act relating to voluntary assignments, the making of the inventory of assets and list of creditors, and annexing them to the deed, are not conditions precedent to the taking effect of the deed so as to pass title to the assignee, nor are they necessary parts of the deed.—*Ibid.*
20. Upon the execution and delivery of the deed of assignment it becomes valid and binding between the parties, and good as against execution creditors although no bond be filed.—*Ibid.*
21. Where possession accompanies the deed of assignment, such deed is not void as to creditors, although not acknowledged and recorded as required by the law relating to voluntary assignments.—*Ibid.*
22. An assignment for the benefit of creditors is not void because it in terms gives to the assignee power to compromise or compound claims in favor

of the estate; nor because it does not directly authorize the assignee to convert *all* the assigned property to pay debts, the assignment in question authorizing a sale of "*all or any part of the said property.*"—*Ginther et al. v. Richmond*, 246.

23. The law allows a debtor to assign his property to pay his debts, and even to make preferences, but compels him to make his selection without any conditions for personal gain to himself; thus he cannot by an assignment hold out a hope of an extra share of his assets or a fear of loss of any participation therein as a means to induce a creditor to abandon all or any part of his claim, or to forbear pursuing his legal remedies therefor.—*Anthony et al. v. Stype*, 271.
24. Evidence offered in a collateral action solely for the purpose of showing that the assignment was void for non-compliance with the statute, properly excluded. To avoid an assignment for non-compliance with the statute, an action must be brought for that special purpose, in which all the parties interested can be heard.—*Klauber v. Charlton*, 283.
25. Where the certain effect of a clause in an assignment for creditors would be to hinder and delay them, it is void as against them. So, an assignment held void, which contained a power to the assignee "to carry on and conduct said business in his discretion for such time as in his judgment it shall be beneficial to do so, or to sell all of said goods and stock in trade and property, at such time, in such manner, and for such price as he may deem proper, and apply the proceeds," etc.—*Jones v. Syer et al.*, 289.
26. The instrument must speak for itself, and the obnoxious provision cannot be modified or explained by extrinsic evidence.—*Ibid.*
27. An assignment for creditors empowered the assignee "to collect the choses in action, with the right to compound for the said choses in action, taking a part for the whole when he shall deem it expedient." *Held*, That this gave the assignee no unlawful or arbitrary power, and took from the creditors no just protection; that it merely gave to the assignee the discretion, which the law recognizes, to compromise doubtful and dangerous debts in cases where the safety and interest of the fund demands such action, and that this clause did not render the assignment void.—*Coine v. Weaver*, 392.
28. The insertion of a provision to pay individual debts out of partnership property in an assignment of the partnership effects of an insolvent firm is evidence of fraudulent intent on the part of the assignors so as to void such assignment.—*Schiele et al. v. Healy et al.*, 417.
29. The whole of an assignment for the benefit of creditors must be expressed in the written instrument.—*Frazier v. Truax*, 452.
30. The assignors concededly were not indebted to all the persons in whose favor preferences were made. They alleged, in explanation, that the debts, though not owing to the persons named, were owing to other persons, and that the preferences were made, as it were, in trust for the real creditors. No such trust, however, was declared on the face of the assignment. *Held*, That the scheme was fraudulent in law, and that the assignment was void.—*Ibid.*
31. No presumption of fraud will arise from the mere fact of a defect in the

form of the certificate of the acknowledgment of a general assignment for the benefit of creditors.—*Tim et al. v. Smith*, 466.

32. To show that such an instrument, though valid upon its face, was in reality given with the design or intent on the part of the debtor of fraudulently disposing of his property, some other evidence must be given than that the assignor had previously obtained goods upon credit by false representations respecting his solvency, and had preferred creditors in the assignment, and that there was a defect in the notary's certificate of the acknowledgment.—*Ibid.*
 33. That part of Sec. 1697, R. S., Wis., which requires the assignee to affix his certificate to the inventory of assets and list of creditors is directory only, and such certificate is not a condition precedent to the taking effect of the assignment, and a failure to affix the same before the filing of such inventory and list will not invalidate the assignment.—*Steinlein v. Halstead*, 474.
 34. An assignment for the benefit of creditors may be made by an attorney constituted for that purpose, and vests the assignee with the title to the assigned property.—*Lowenstein et al. v. Flaurand et al.*, 479.
- See ASSETS, 2-4; ASSIGNEE, 5, 13-15, 32; BOND, 1, 2; FRAUD, 1, 2, 4, 5; PARTNERS, 1-3; REVOCATION.

ATTACHMENT.

1. Where a corporation located in one State (Pennsylvania) had gone into insolvency and made an assignment under those laws and given notice to a debtor thereto residing in another State (Connecticut), a creditor in the latter State may afterwards attach and acquire a valid lien upon said debt as against the trustee in insolvency.—*Paine v. Lester*, 91.
2. It does not affect the question if such attaching creditor is a non-resident of the State (Connecticut) whose courts he comes into and invokes the aid of the laws thereof; he is entitled to it the same as a citizen of the *lex fori*.—*Ibid.*
3. An attachment obtained by a creditor on the ground that an assignment for the benefit of creditors is a fraudulent disposition of the debtor's property can only be levied upon the property and not upon its proceeds.—*In re True*, 108.
4. The proceeds can only be reached by an action in equity by creditors against the assignee, after exhausting their legal remedies.—*Ibid.*
5. Property of a debtor in the hands of an assignee for the benefit of creditors cannot be attached so as to establish an enforceable lien against it.—*Smith et al. v. Longmire et al.*, 424.
6. Where an assignment has been set aside as fraudulent, intervening attaching creditors are not entitled to a reference to ascertain any questions of priority between themselves and the creditors at whose suit it was set aside.—*Ibid.*
7. Where defendant L., who made an assignment in the State of New Jersey for the benefit of creditors, valid according to the laws of that State, though invalid here, had certain claims and credits in this State, which were at-

tached in this action, *Held*, That though movable property may have an actual situs apart from that of the domicile of the owner, there is no such rule as to claims and credits; and as to these the assignment in New Jersey was effectual to pass to the assignees a valid title, and the assignees having taken possession of the same, and having received the avails and proceeds, cannot be disturbed in their rights to the property by this action or the attachment issued therein.—*The Howard National Bank v. King et al.*, 461.

See PRIORITY; RECORD, 3.

BANKRUPTCY.

1. A composition in bankruptcy does not become effective so as to discharge the debtor from his debts until the composition notes are paid, and if a note given to a creditor agreeing to the composition is not paid when due he can sue for the original debt and is entitled to his *pro rata* proportion under an assignment for the benefit of creditors, if one has been made.—*In re assignment of Leipziger*, 147.
2. The debtor made a voluntary general assignment for the benefit of creditors. Proceedings in bankruptcy having been commenced against him within three months thereafter, he made a proposal for composition, which was accepted, the resolution providing that upon *payment* of the composition the debtor's property in the hands of the voluntary assignee should be forthwith delivered to the debtor and the said assignee released and discharged from all claims against him on the part of the creditors arising out of his office. No adjudication was had against the debtor. On an application made before the composition notes were payable to remove the voluntary assignee on the ground that he had failed to file a bond, and that without filing such bond he had been selling and disposing of the estate, *Held*, that the assignment was in no way affected by such agreement of the creditors; that the assignee was not thereby relieved of his duty to file a bond, and that if he should do so and then transfer the property to the debtor he would do it upon his own responsibility if the composition is not carried out.—*Ibid*.
3. The statute of New Jersey, enacted in 1846, entitled, "An Act to secure the creditors an equal and joint division of the estate of debtors who convey to assignees for the benefit of creditors," is an insolvent law, and as such was suspended by the passage by Congress of the United States Bankrupt Act.—*Boese v. Locke et al.*, 209.
4. The general assignment law of other States distinguished and their effect discussed.—*Ibid*.
5. The Insolvent Act of 1846, of the State of New Jersey, although in the nature of a bankrupt law, was not suspended by the U. S. Bankrupt Act. Only the 14th Section of the New Jersey Act, which provides for the discharge of insolvents, was suspended.—*Boese v. Locke et al.*, 326.

See ACCOUNTING, 8; ASSIGNEE, 28; ASSIGNMENT, 9, 10; CHATTEL MORTGAGE, 1; DISCHARGE, 4.

BANKS.

See SET-OFF, 3-5, 7.

BAR.

See DISCHARGE, 1.

BONA FIDE PURCHASER.

1. When a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser.—*Stearns v. Gage*, 333.
2. To charge a party with such notice, the circumstances known to him must be such as ought reasonably to have excited his suspicion and led him to inquire.—*Ibid*.

BOND.

1. Under the statute of Wisconsin a voluntary assignment for the benefit of creditors is invalid, unless it be shown, by the affidavits of the sureties on the bond of the assignee, that they have property to the requisite amount *within the State*.—*Churchill v. Whipple et al.*, 6.
 2. Under the Act of March 4, 1875 (Minn.), entitled "An Act to protect the creditors of assignees and to regulate the duties of assignees," the requirement in Section 3 that the assignees shall, within five days after the filing of the inventory by the assignor, file a bond conditioned as therein provided, is imperative, and if he fails to file the bond within the time his interest in property assigned ceases.—*Kingman v. Barton*, 88.
 3. The certificate made by the proper officer, although *ex parte*, of the qualifications and pecuniary responsibility of the sureties on an assignee's bond is conclusive upon all parties interested in every collateral action, unless it be shown by the creditors attacking the assignment that it was made for the purpose of hindering, delaying or defrauding the creditors of the assignor within the meaning of the statute.—*Klauber v. Charlton*, 283.
- See ASSIGNEE, 5, 6; ASSIGNMENT, 14, 20; DAMAGES.

CHATTEL MORTGAGE.

1. A chattel mortgage executed by a firm, unless it is filed in the city or town where the members of the firm severally reside, as prescribed by the New York statute, is void as against purchases and mortgages in good faith; but such a mortgage is good as between the parties, and as against an assignee in bankruptcy.—*Stewart et al. v. Platt*, 308.
2. Where a partner disposes of his interest in the firm property to his co-partner, taking a chattel mortgage on the property to secure the price, and thereafter the latter makes a general assignment for the benefit of creditors,

the assignee will be allowed to recover the property from the mortgagee, or from one who claims under him who is not a bona fide purchaser for value; and to do so it is not necessary that the assignee should first recover judgment. Proof of the firm's insolvency when the sale took place and the mortgage was given is material.—*Hard v. Milligan et al.*, 329.

3. The action being for a wrongful conversion, the plaintiff has his election to sue one or any number of several joint tortfeasors. Hence, the mortgage creditor is not a necessary party.—*Ibid.*
4. A bill of sale intended as a chattel mortgage, binding on the parties, is valid as against the assignee.—*Hawks v. Pretzlaff*, 389.

COMPOSITION.

1. Plaintiff must show himself to have been injured by fraudulent representations to recover, and the rule holds good as to representations concerning composition agreements.—*Bartlett v. Blaine*, 53.
2. Where an assignment is made for the benefit of creditors, and a composition agreement is signed by some of the creditors conditioned that all the creditors shall sign it, the release is not binding until all have signed.—*Mueller v. Dobschutz et al.*, 69.
3. A creditor signing such an agreement can stipulate that the liability of sureties shall be retained, and it is sufficient if this stipulation is entered below the signature and is not in the body of the instrument.—*Ibid.*
4. A creditor, who has made a verbal agreement with his debtor and with other creditors to unite in a composition deed, and who subsequently refuses to sign the same, can only recover the rate specified in such composition deed.—*Mellen et al. v. Goldsmith*, 298.
5. A composition between a debtor and a number of creditors is good between all the parties to it, unless the debtor has failed to comply with some of its conditions, or its validity depends upon a certain number of the creditors joining in it.—*Laird v. Campbell*, 304.
6. The plaintiff, having given to the defendants a note for the balance of their debt against him, after deducting the amount of the composition, in pursuance of a secret agreement and to induce them to enter into the composition, was obliged to pay the note, which subsequently came into the hands of a bona fide holder before maturity; he then sued to recover the money so paid. *Held*, That the agreement was void as against public policy, yet the Courts could not aid either party as against the other.—*Solinger v. Earle et al.*, 362.

See ACCOUNTING, 8; ASSIGNEE, 3, 17; BANKRUPTCY, 1, 2.

COMPROMISE.

1. There is no authority for an order or direction by the court to authorize or empower assignees under the General Assignment Act of 1877 (Laws N. Y., Chap. 486) to compromise claims due the assignee's estate at the discretion of the assignee.—*In re Ransom*, 73.
2. Such an order would virtually annul the authority given by statute to the

county judge to authorize the compromise or compounding of a claim, upon good and sufficient cause shown therefor.—*Ibid.*

3. The power of the county judge to allow a debt or claim to be compromised by an assignee which is due an insolvent debtor, relates to the circumstances of each particular case, and he cannot delegate such authority to another.—*Ibid.*

CONTEMPT.

1. Where it is not shown that the money is actually in an assignee's hands a final decree requiring the payment of money cannot be enforced by attachment as for contempt, but by an execution as any other judgment for the payment of money.—*In re Stockbridge's assignment*, 292.

CONVERSION.

See ASSIGNEE, 12; EVIDENCE.

CONVEYANCE.

See ASSIGNEE, 6, 30; FRAUD, 6-8; PREFERENCE, 2.

CORPORATIONS.

1. Subscriptions make up the capital stock of insurance companies, and constitute a trust fund for the benefit of the creditors. Stock notes of an insolvent insurance company can only be enforced so far as necessary to indemnify creditors. The declaration should show the amount of such deficit.—*Lamar Ins. Co. v. Moore*, 62.

See ATTACHMENT, 1, 2.

COSTS.

1. There is no authority for allowing costs and counsel fees, in proceedings under the General Assignment Act, to parties other than the assignee, payable out of the assigned estate.—*In re assignment of Currier*, 97.
2. The statute intends that the power to award costs and counsel fees shall be confined to cases of disputed claims as between the contestants.—*Ibid.*
3. The intention of the statute is to prevent any waste of the funds in the assignee's hands by the encouragement of litigation.—*Ibid.*

See DISPUTED CLAIMS, 2.

CREDITORS.

1. One creditor may be secured, if done in good faith, though others may be injured.—*Francis v. Rankin*, 52.

See ACCOUNTING, 7, 8; DISTRIBUTION.

CREDITOR'S BILL.

1. An attaching creditor has not, before he obtains judgment in the attachment suit, such a claim upon the property of the defendant as will entitle him to maintain an action to set aside an alleged fraudulent conveyance of the defendant.—*Tennent v. Battey*, 133.

2. **Alberts** was surety upon a debt due from **David Evans** to **Goodall**, contracted in January, 1873. In January, 1876, judgment was rendered against **Alberts** in favor of **Goodall**, a judgment having previously been rendered against the principal **Goodall**. In January, 1878, **Alberts** filed his petition against **Evans** and his wife, alleging that in June, 1873, **Evans**, without consideration, conveyed to his wife real estate which she held in trust for him, and sought to have it applied to the payment of the judgment. *Held*, That the case does not fall within the provision of the code limiting an action for relief on the ground of fraud to four years, although the petition charged, that "Evans, being largely embarrassed and in failing circumstances, and with the intention of hindering and delaying his creditors," made the conveyance.—*Evans et al v. Alberts*, 230.
3. A creditor of a deceased debtor may file a bill against a fraudulent grantee of the latter to reach the property conveyed without first obtaining a judgment on his debt or proceeding against the property of the estate.—*Armstrong et al v. Croft et al.*, 259.
4. To such a bill a plea by the fraudulent grantee that the creditor had not brought an action on his demand within two years and six months from the qualification of the personal representative is no defence.—*Ibid*.
5. To entitle a creditor to the aid of a court of equity in setting aside a conveyance as fraudulent, there must be a judgment, an execution on the same, and a return.—*Adee v. Bigler*, 348.
6. Where a debtor fraudulently conveyed real estate under an agreement by which he was to have the use of a portion of the premises for three years without rent, *Held*, That the interest of the grantor in the premises could be reached by his judgment creditors; that if he obtained only a parol lease for three years, which would be void under the statute of frauds, the consideration having been wholly paid, equity would decree performance to prevent irreparable loss.—*Crouse et al. v. Frothingham et al.*, 441.
7. Where an assignee for creditors refuses to bring an action to set aside a fraudulent conveyance, and allows such an action by judgment creditors, to which he is a party, to go by default, the plaintiffs, on succeeding, are entitled to the fruits of their vigilance to the exclusion of the other creditors.—*Ibid*.
8. A creditor's bill will lie to reach personal as well as real property claimed to have been transferred by a judgment debtor in fraud of his creditors; and where the property that can be reached is machinery, tools, etc., such new tools and machinery as have been purchased for the purpose of supplying waste of ordinary wear and tear are properly included.—*McCloskey v. Stewart et al.*, 468.

See PARTNERS, 4.

DAMAGES.

1. In an action, brought by a creditor whose claim has been duly allowed, on an assignee's bond for a failure to account for any of the property assigned, the amount of recovery cannot be limited to an amount proportionate to the whole amount of the claims of all the creditors, including those not

allowed as required by the statute, but the amount of recovery must be controlled by the proportionate amount of his claim to the whole amount of those only which have been presented and allowed pursuant to the statute.—*Lahn et al. v. Johnson et al.*, 1.

DISCHARGE.

1. Under the General Statutes of Massachusetts, a discharge in insolvency is a bar only as to debts contracted by the debtor within the State, and while an inhabitant of the State.—*Bell v. Lamprey*, 10.
2. A debtor in insolvency proceedings will not lose his right to a discharge by an *accidental* omission to give the required notice to one or more creditors.—*Weeks et al. v. Buderus*, 38.
3. A plea of discharge under a foreign insolvency law must set out the law and must show that the order released the party pleading the same from liability for his debts.—*Baker v. Palmer*, 67.
4. A person imprisoned upon an execution issued against him on a judgment in a civil action will not be discharged from such imprisonment under article 6, title 1, chapter 5, part 2, Revised Statutes, where it appears that a few days after his arrest he was adjudged a bankrupt under the United States laws on his own petition.—*In re Fitzgerald*, 100.
5. When it appears that, without any act or fault on the part of the imprisoned debtor, and against his will, all the property which he had at the time of his arrest had been taken from him, the court will not refuse his discharge.—*Ibid.*
6. When a judgment debtor has disposed of his property with the intent to defraud his creditors and is imprisoned on an execution at the instance of the creditor whom he has defrauded, he is not entitled to be discharged from such imprisonment by making a voluntary assignment under the statute.—*In re Brady*, 102.
7. It need not appear that the fraudulent disposition was made in contemplation of applying to be discharged; it will be sufficient to defeat such discharge, although made before the commencement of the action in which the execution was issued.—*Ibid.*
8. But it must appear to have been made with the intent to defraud creditors existing at the time of the disposition of the property.—*Ibid.*
9. A discharge from imprisonment of a debtor will be withheld when the proceedings are not just and fair.—*In re Benson*, 301.
10. That which is required on an application for the discharge from imprisonment upon final process in a civil action is that the proceedings of the debtor in respect to the matters he is required to swear to upon presenting the petition have been just and fair, and that the affidavit is true.—*In re Fowler*, 319.
11. A discharge cannot be withheld because the debtor has made a false and fraudulent representation as to the solvency of a person to whom credit was given by the person who has obtained a judgment for damages against the petitioner for the deceit.—*Ibid.*
12. An application by the prisoner for his discharge as a bankrupt is not such

- a disposition of his property as is contemplated by the act; for whatever property he possesses under such a proceeding goes to his creditors.—*Ibid.*
13. A judgment debtor may be discharged from imprisonment under Sec. 2200 of the Code, notwithstanding he has made a general assignment of all his property for the benefit of creditors.—*In re King*, 351.
 14. In a proceeding for the discharge of an imprisoned debtor from arrest under the provisions of the Revised Statutes, the question whether his schedules are just and fair is one for the County Court to determine.—*Richmond v. Prain*, 427.
 15. The affidavit required by 2 R. S., 32, Section 5, must be endorsed and sworn to before a copy of the petition is served on the creditor and must be upon the petition when it is first presented to the court.—*Ibid.*
 16. It is immaterial that the affidavit is annexed to instead of being endorsed upon the petition.—*Ibid.*
- See ASSIGNEE, 1, 8, 9, 17; PETITION, 1-4.

DISPUTED CLAIMS.

1. Disputed claims are to be tried by special order of the court, and upon due notice to the creditor whose claim is attacked. No creditor is bound to come to the assignee or referee with proof of his claim.—*In re accounting of Oakley*, 56.
 2. Where the trial of a disputed claim is had, the court will only allow the usual five per cent. on the claim, costs of proceedings before and after trial, and the usual trial fee.—*Risley v. Smith*, 281.
- See PRACTICE, 4.

DISTRIBUTION.

1. Under the statute of Iowa, creditors who fail to file their claims with the assignee within three months after the first publication of the notice of assignment are not entitled to share *pro rata* in the first dividends.—*In re assignment of Holt*, 58.
2. It is not necessary for creditors whose claims are inserted in the schedules of an assignment, under the Act of 1877, Chap. 466, to present them to the assignee with vouchers in order to participate in the fund on the accounting of the assignee.—*In re accounting of Oakley*, 56.
3. The practice in similar cases prior to the General Assignment Act of 1860, as recognized in *Kerr v. Blodgett* (48 N. Y., 62), is not now applicable under the general assignment acts.—*Ibid.*
4. In an accounting under the latter the court has no power to make an order requiring creditors to appear and prove their claims or be excluded from any share of the assigned estate.—*Ibid.*
5. Where two partners are jointly liable, and a judgment entered therefor, and after the judgment the said partners make an insolvent assignment, one of the partners being also individually insolvent, the creditor may share equally the personal effects of the other partner, and is not to be subordinated to the individual creditors of such partner.—*Howell et al. v. Teel et al.*, 130.

6. A creditor whose name appears on the schedule, but who has failed to present proof of his claim, is not entitled to a share in the insolvent's estate.—*In re Bailey*, 268.
 7. Where an assignment makes no provision for the indemnification of persons who, subsequently to the assignment, incur liabilities, or make advances for the assignor, their claims should not be allowed.—*Risley v. Smith*, 281.
- See ASSIGNMENT, 1 ; PARTNERS, 5, 6.

ESTOPPEL.

See PRACTICE, 4.

EVIDENCE.

1. The assignment was made and accepted January 2d, and the assignee took immediate possession and did not employ the assignor in any capacity about the store. Defendant, as sheriff, levied on the goods January 16th. In an action for conversion, *Held*, That declarations made by the assignor at the time the levy was made were not admissible.—*Coine v. Weaver*, 392.

See ASSIGNMENT, 24, 26 ; CHATTEL MORTGAGE, 2.

EXECUTION.

See ASSETS, 4 ; ASSIGNEE, 32 ; ASSIGNMENT, 4, 18 ; RECORD, 2.

EXEMPTION.

1. The creditors of a firm have the right to follow the firm assets into land bought with the purchase-money of other land in which the assets were first invested, and the partner making the investment cannot claim a homestead exemption in such land as against the firm creditors.—*Chalfont v. Grant*, 251.
2. A homestead cannot be claimed against creditors in realty fraudulently conveyed by the husband to the wife, if at the date of the conveyance the husband and wife were occupying other property as a homestead.—*Gibbs v. Patton*, 252.
3. Where, at the date of the fraudulent conveyance, the husband and wife occupy as a homestead the adjoining property of less value than one thousand dollars, but have removed from it at the time the bill is filed to set aside the fraudulent conveyance, a subsequent reoccupancy of the adjoining premises will not entitle them to a part of the land fraudulently conveyed sufficient to make out the value of one thousand dollars.—*Ibid*.

FACTORS.

1. A consignment of goods by a consignor to a factor for sale for the account of the consignor upon a *del credere* or any other kind of commission does not divest the consignor of the title to his goods, and the property in the proceeds follows that in the goods.—*The Converseville Co. v. The Chambersburg Woollen Co. et al.*, 166.

2. Where consignees make a general assignment for the benefit of creditors, the consignors are entitled to all the goods and the proceeds thereof which come into the hands of the assignee.—*Ibid.*
3. The title of the consignors is not divested by reason of the assignment, notwithstanding for an extra commission the consignees guaranteed the payment of the price of the goods sold.—*Ibid.*

FRAUD.

1. A general assignment, executed with the intent and for the purpose of thereby effecting a compromise with the creditors of the assignor, is void.—*Bennett v. Ellison*, 26.
2. It is not necessary, in order to enable the creditors to avoid the assignment, that the assignee should have had knowledge of the assignor's fraudulent intent.—*Ibid.*
3. In a sale by an insolvent vendor, inadequacy of price is evidence of fraud.—*Rhoads v. Blatt*, 45.
4. An assignment may be fraudulent although all the forms of law are complied with, but if it be made in the form or manner provided by law, and duly recorded so as to pass all the property of the assignor, the motive existing in his mind cannot affect its validity; the fraud that is forbidden arises from acts done contrary to law or equity.—*Wilson v. Berg*, 169.
5. The acts and declarations of the assignor are evidence to impeach it only in so far as they prove he has unduly controlled or changed the legal effect of the assignment.—*Ibid.*
6. A voluntary conveyance is not fraudulent against creditors amply secured by mortgage; nor does it become so from the mere fact that subsequently by delay, at the instance of the debtor, the mortgage security is lost.—*Stephenson's exors. v. Donahue et al.*, 219.
7. The transfer of property by a husband to his wife without consideration, for the purpose of placing it beyond the reach of future creditors, *Held* fraudulent and void as to such future creditors.—*Curr et al. v. Breese et al.*, 255.
8. The statute relating to fraudulent conveyances (2 R. S. 13, Sec. 5) provides that its provisions "shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of fraud rendering void the title of such grantor." This means actual notice or knowledge of circumstances which are equivalent to such notice. Merely circumstances to put the purchaser on inquiry, where full value has been paid, not sufficient.—*Stearns v. Gage*, 333.
9. The mere fact that a debtor, who has made an assignment with preferences, purchased goods shortly before making the assignment, for which he had no reasonable hope of paying, is not sufficient evidence of a fraudulent disposition of property.—*Talcott v. Rosenthal*, 367.
10. One B., when in prosperous circumstances, purchased a house and lot, the conveyance being taken in his wife's name, and afterwards paid all his

debts, and continued prosperous and in good credit in his business for three years thereafter. It did not appear that his subsequent inability to pay his debts could reasonably have been within his knowledge at the time of the conveyance. *Held*, That these facts were sufficient to rebut the presumption of fraud arising from a want of consideration for the conveyance, and that the conveyance was valid as against subsequent creditors.—*Carr et al. v. Breese et al.*, 379.

11. B. retained about half his property after deducting the amount transferred to his wife. *Held*, That the settlement was not unreasonable nor utterly disproportionate to his means.—*Ibid*.
12. A sale of his property by a debtor who is insolvent, or in failing circumstances, with the intent thereby to put it beyond the reach of his creditors, or to hinder, delay, or defraud them, will pass a good title to the purchaser paying full consideration, *unless* he had knowledge of the fraudulent intent or was possessed of information which was calculated to put him on inquiry, and which, if followed up, would have led to the discovery of the fraudulent intent; but if the purchaser has such knowledge, or means of acquiring it, the payment of full value for the property is not sufficient to protect him.—*Durr et al. v. Kelly et al.*, 431.
13. If the intention or purpose of the debtor making the sale, he being insolvent or embarrassed, is to give a preference among his creditors, at his election, in the subsequent use of the proceeds of sale, this is fraudulent as against creditors, particularly if the sale is on credit; and the same rule applies as to the participation of the purchaser in the fraud.—*Ibid*.
14. If the debtor's intent was to delay his creditors until the maturity of the purchaser's notes for the price, the case is within the terms of the statute, and the sale is fraudulent as to his creditors, although made "to prevent a sacrifice of his property by sale under execution, and to get the value of it for the purpose of paying it to his creditors."—*Ibid*.
15. It is not necessary that the fraudulent intent should extend to all the creditors: if the intent be to hinder, delay, or defraud one or more of them, it is within the statute; and the fact that the sale was open and notorious, and for a full and fair price, are immaterial considerations.—*Ibid*.
16. If the purchaser of goods from an insolvent debtor intentionally intermingles them with his own goods, and refuses to furnish the sheriff, seeking to levy an execution on them as the property of the vendor, the information necessary to distinguish them, he cannot claim any advantage from the confusion of goods; and having interposed a claim under the statute to the goods levied on, the duty is cast on him to furnish the proof necessary to separate the goods.—*Ibid*.

See ACCOUNTING, 10; ASSIGNEE, 26; COMPOSITION, 1; CREDITOR'S BILL; DISCHARGE, 6-8, 11.

HOMESTEAD.

See EXEMPTION.

HUSBAND AND WIFE.

1. A firm executed a deed of trust for the benefit of their creditors. The wife of one of the firm had an estate consisting of real and personal property, which, by an ante-nuptial contract, was secured to her sole, separate, and exclusive use. This contract was registered in the county where the property was situated, and where the husband resided at the time it was made. Subsequently the wife sold the land, and both husband and wife removed to another county, but the ante-nuptial contract was not registered in the latter county until six months after the bill in this case was filed; this bill was to subject the proceeds of the sale of the land, and also the rest of the estate held by the wife under the ante-nuptial contract to the payment of the firm's debts, by the firm creditors, under the deed of trust for their benefit. *Held*, Between husband and wife a marriage contract is good without registration; but, to protect the property from the husband's creditors, registration is necessary in the county of residence at the date of the marriage, and every county into which the husband removes with the property.—*Cowan v. Mann*, 262.
2. But, in a county where the contract is not registered, choses in action cannot be reached by the husband's creditors unless they have been reduced to possession by him, and are in his possession at the time the bill is filed.—*Ibid*.

See EXEMPTION, 2, 3; FRAUD, 7, 10, 11.

IMPRISONED DEBTORS.

See DISCHARGE, 4-16; PETITION, 1-4.

INJUNCTION.

See PARTNERS, 4.

INSPECTION.

See PRACTICE, 1, 2.

JUDGMENT.

1. Upon a sale of real estate under Act of February 17, 1876, P. L. 4, by an assignee for the benefit of creditors, a judgment which was a lien at the time of the sale and of confirmation, and would then be entitled to be paid out of the proceeds, is not deprived of its right thereto by reason of the expiration of five years from its entry before payment of the purchase money and delivery of the deed.—*Herbst & Buehler's appeal*, 224.
2. L. brings an action on a bond against B., which is on the office judgment docket of the court at its March term, which commences on the third of the month, and the office judgment is confirmed on the fifth, which is the last day of the term of the court. On the first day of the same term of the court B. goes into court, and confesses a judgment in favor of S., no suit having been instituted against B. by S. *Held*, 1. The judgment in

favor of S. is valid, though no suit has been instituted by him against B.
 2. That the judgment of L. relates back to the first day of the term, and the law not regarding a fraction of a day, both judgments stand as of the same date.—*Brockenbrough's exrx. et al. v. Brockenbrough's admr. et al.*, 233.

JURISDICTION.

1. The jurisdiction over assignments for the benefit of creditors, and proceedings thereunder, granted by Chap. 44, General Laws, 1876 (Minn.), is vested in the several District Courts, to be exercised through the judges thereof as their organs. In exercising this jurisdiction, the court may remove an assignee for any misconduct in the administration of his trusts under the assignment which shows such removal to be necessary in order "to insure a faithful performance of the trusts, and a speedy close of the same by final decree of settlement and distribution." The petition authorized by Sec. 10 of the statute, showing a default of the assignee in not filing his report, may be made and filed by either of two assignors as a "person interested in the estate," within the meaning of that section. The investigation authorized by the statute is a summary one, to be conducted under the control and in the discretion of the court, to the end that it may acquire the requisite information to act advisedly in the exercise of it, supervisory jurisdiction over the assignment, and the proceeding thereunder; and whether the creditors become parties to it or not, any fact tending to give such information is a proper subject of inquiry.—*Clark v. Stanton*, 81.
2. It is not error to allow any of the creditors to become parties, and participate in such investigation, during any stage of the proceedings.—*Ibid.*
3. Where, in an assignment by two persons as partners, it is provided that upon a fulfilment of the trusts, the residue, if any, of the property shall be reconveyed to the assignors, the jurisdiction of the court under this statute ends with the final decree, distributing the trust property or its proceeds, and directing a reconveyance of the residue according to the terms of the assignment, and it is not required of the court that it should determine the respective interests of the assignors in such residue, or making any apportionment thereof between them.—*Ibid.*

See ACCOUNTING, 6, 10; ASSIGNMENT, 16; PETITION, 5; SALE, 2.

LIMITATIONS.

See CREDITOR'S BILL, 2, 4.

MORTGAGE.

1. The right to impeach or set aside a mortgage which is fraudulent and void as against the creditors of the mortgagor does not pass to an assignee of the mortgagor by a voluntary general assignment in trust for the benefit of creditors, subsequently executed and unaffected by any statute in force at the time.—*Fowler v. Cornish*, 184.

2. Courts of Equity may appoint a receiver of the rents and profits in a suit for foreclosure of a mortgage where the mortgaged premises are insufficient to pay the debt and the mortgagor is insolvent. This may be done after a decree and sale of the premises. And it may also be done even if the mortgagee has a title which he may enforce at law, if the source thereof be altogether independent of the mortgage title, and more particularly if the legal title is disputed and uncertain. The law in various States discussed.—*Haas v. The Chicago Building Soc.*, 201.
3. A referee to ascertain liens in a foreclosure suit has authority to inquire as to the validity of a conveyance or of a mortgage. No reason exists why the fraudulent character of conveyances cannot be tested in these proceedings as well as that of all other liens. The inquiry as to the existence and amount of the lien involves the further question as to its validity.—*Bergen v. Snediker et al.*, 341.

PARTIES.

See CHATTEL MORTGAGE, 3; JURISDICTION, 2.

PARTNERS.

1. One member of an insolvent firm cannot, either before or after dissolution of the partnership, make a valid assignment of all its effects for the benefit of creditors against the will of a copartner, or without procuring his assent when present and accessible.—*Holland et al. v. Drake et al.*, 20.
2. If such other partner subsequently ratifies the assignment, the ratification relates back and takes effect from the time of executing the assignment; but not so as to defeat the rights of third persons *bona fide* acquired in the meantime.—*Ibid.*
3. A general assignment by a limited copartnership cannot give a preference to the special partner for the amount of his investment.—*Whitcomb et al. v. Fowle*, 160.
4. A creditor, although he has not obtained judgment, may file a bill in equity to restrain insolvent partners from disposing of the property contrary to law, and for the appointment of a receiver.—*Ibid.*
5. Where a firm makes an assignment for the benefit of firm creditors, and afterward each partner assigns for the benefit of his individual creditors, the firm creditors cannot resort for a deficiency to the individual estates of the partners until their individual creditors shall have been satisfied.—*Davis v. Howell*, 357.
6. Where the members of a firm make an assignment, for the benefit of their creditors, of their individual and copartnership estate, and the individual estate of one of the copartners is more than sufficient to pay his individual indebtedness, the individual creditor has the right to claim his debt and the damages, by way of interest, which he has sustained by reason of non-payment at maturity, up to the time of the distribution.—*In re accounting of Shipman*, 413.

See ASSIGNMENT, 28; DISTRIBUTION, 5; EXEMPTION, 1; JURISDICTION, 3.

PETITION.

1. On a petition to be discharged from imprisonment in civil causes, pursuant to article sixth of N. Y. Revised Statutes, p. 31, the petition is properly addressed to the court, and not to the officer before whom it is to be made.—*In re Moore*, 95.
 2. In such proceeding the petition should show the cause of the imprisonment.—*Ibid.*
 3. The petition and an account of the property of the applicant must be served as required by the statute.—*Ibid.*
 4. A person who is at large on the jail limits may make the application, for he is regarded as being in "actual custody" in the meaning of the statute.—*Ibid.*
 5. An averment in a petition to compel an assignee for the benefit of creditors to account that the petitioner is a creditor is sufficient on that head to give jurisdiction, and the only effect of a denial of that fact in the affidavit of the assignee is to make an issue for the County Judge to hear, try and determine.—*In re assignment of Farnam*, 127.
 6. In such a petition it is not necessary for the petitioner to profess that he comes in behalf of all the other creditors.—*Ibid.*
- See DISCHARGE, 15, 16 ; JURISDICTION, 1.

PLEADING.

See DISCHARGE, 3.

PRACTICE.

1. An order for the examination of witnesses, and the production of any books and papers by any party or witness, or the assignee under Section 21 of the Act of 1877, Chap. 466, may be had at any time, and is not necessarily confined to cases where a proceeding under the Act is pending.—*In re assignment of Bryce et al.*, 186.
2. An inspection made without an order made on petition gives no right to file with the County Clerk abstracts from the books, nor to use them in proceedings under the Act.—*Ibid.*
3. All proceedings under the Insolvent Act in New York City are deemed to be had in court, although conducted before a judge of the Common Pleas, and all orders and decrees have the same force and effect, and may be entered, docketed, enforced, and appealed from, the same as if made in an original action brought in the court.—*In re petition of Cohn et al.*, 221.
4. An assignee for the benefit of creditors must except to doubtful claims against the estate, which are duly presented to him, within the time limited by statute; the creditor is not estopped by his delay in producing proof of the justness of such a claim, nor does the delay excuse the assignee from his neglect to except.—*Miller v. Mulford*, 293.
5. It being the duty of an assignee to uphold his trust, and not to impeach it,

he will not be permitted to show that the assignment was fraudulent and void in any particular.—*In re assignment of Ward & Peloubet*, 339.

6. Where an application is made for a partial accounting, and for the payment of the whole or any part of a creditor's claim, it is discretionary with the court to order or not the payment to be made.—*Ibid.*
7. In a civil action, to establish any proposition for either party, it is only necessary that the evidence should produce a reasonable conviction in the minds of the jury: a charge asked, requiring a fact to be "clearly" proved, is properly refused.—*Durr et al. v. Kelly et al.*, 431.

See ACCOUNTING, 2, 9; ASSIGNEE, 1-4; ASSIGNMENT, 5; DISCHARGE, 14; DISPUTED CLAIMS, 1; DISTRIBUTION, 3, 4; JURISDICTION, 1, 2.

PREFERENCE.

1. Prior to the making of the general assignment, the debtor conveyed certain property to a firm of which the assignee was a member, for the purpose of giving such firm a preference over his other creditors. *Held*, That the assignee was not chargeable with the value of such property as against a creditor not a party to the assignment; that as between the firm and any creditor not a party to the assignment, they had a right to hold the property conveyed to them by the debtor.—*Hanscom v. Buffum et al.*, 39.
2. The provisions of the Statute of Maine (Act of 1859, Chap. 112, Sec. 2), avoiding conveyances made in contemplation of insolvency to one creditor with intent to give him a preference, are made for the benefit of those who come in under the assignment, and are not to be extended to those who refuse to do so.—*Ibid.*

See ACCOUNTING, 9; ASSIGNMENT, 6, 8, 10, 30; PARTNERS, 3.

PRIORITY.

2. After the execution, but before the delivery of an assignment to the assignee, an attachment was levied on the property assigned. The assignment had, however, been previously given to an agent of the assignee for delivery to the latter; and antecedent to that the assignor had had a conversation with the assignee relative to the contemplated assignment. As soon as the assignee received the assignment he accepted the trust, until which time he had no actual knowledge of an assignment having been made. The assigned property was left by the agent in charge of the assignor for the assignee. *Held*, The assignment was prior to the attachment.—*Stamp v. Case*, 226.
2. There must be in some way an assignment of the debtor's property to a third party for distribution among his creditors before Section 3466 of the U. S. Revised Statutes can be invoked, and then it acts directly upon the assignee, by requiring him to pay the claim of the United States first, or making him personally liable unless he does it.—*Bush v. United States*, 488.

See ATTACHMENT, 6; RECORD, 3.

RECEIVER.

See MORTGAGE, 2; PARTNERS, 4.

RECORD.

1. Under the statute of Indiana "providing for voluntary assignments" (1 R. S., 1876, p. 142), the title to the property assigned does not pass to the assignee until the assignment is duly recorded.—*Forkner v. Shafer et al.*, 16.
2. The assignee cannot replevy personal property from an officer who holds the same by virtue of an execution levied prior to the recording of the assignment.—*Ibid.*
3. An assignee for the benefit of creditors orally assented to act, caused the assignment to be recorded without his assent being written thereon, and took actual possession of the property. Thereafter, but on the same day, the property was seized under an attachment. Some days later the assignee signed and acknowledged his assent to act and the assignment was again recorded. *Held*, That the first act of recording was unauthorized and void under Chap. 466, Laws of 1877, and that the attaching creditors obtained a priority of right to the property as against any claim which the assignee could interpose.—*Rennie et al. v. Bean et al.*, 420.

See ASSIGNMENT, 8, 21.

REFERENCE.

See ASSIGNEE, 4; ATTACHMENT, 6; MORTGAGE, 3.

RELEASE.

See TRUST DEEDS, 4.

REMOVAL.

See ACCOUNTING, 5; ASSIGNEE, 23, 24; JURISDICTION, 1.

REPLEVIN.

See RECORD, 3.

REVOCATION.

1. As between the parties to an assignment it is binding and revocable at their pleasure, but such revocation cannot in any way prejudice or impair the rights of creditors.—*Whitcomb et al. v. Fowle*, 160.

SALE.

1. An order of the County Court setting aside a sale made by an assignee for the benefit of creditors, on the ground that a better price can be obtained, is appealable to the General Term of this Court.—*In re assignment of Rider*, 397.

2. The County Court has no power to make such an order, the sale being made by the assignee by virtue of his power in trust, and not a judicial one.—*Ibid.*

See ASSIGNEE, 6; FRAUD, 3, 12-15.

SET OFF.

1. Defendants purchased lumber of one J., who two days later made a general assignment. At the time of said purchase defendants held J.'s note, which matured before they received notice of the assignment. In an action by the assignees to recover the price of the lumber, *Held*, That defendants were entitled, under the Statute of Minnesota, to set off the amount due them on the note.—*Martin et al. v. Pillsbury et al.*, 42.
2. Defendant made a note at ninety days, which was discounted and held by a bank in which he had an account. Before the maturity of the note the bank made a general assignment for the benefit of creditors. In an action brought by the assignees on the note, *Held*, That defendant had a right to set off a balance due him on his deposit account at the date of the assignment.—*Jordan et al. v. Sharlock*, 48.
3. In Pennsylvania a bank may set off the amount of notes of a depositor held by it, not matured at the date of a voluntary general assignment by such depositor, against the moneys in its hands on deposit at that time.—*Green v. The National Security Bank*, 120.
4. The clerk and master of the chancery court kept a deposit account at a bank in his name as "C. and M.," consisting partly of his individual money, partly of money collected by him officially but belonging to the suitors of the court, entered to his credit without discrimination, and on which he was in the habit of checking for his individual purposes. *Held*, Upon the insolvency of the bank, and an assignment of its assets in trust for creditors, that so much of the deposit as belonged to the depositor individually could be set off against a debt due by him personally to the bank by note in the hands of the trustee; and the evidence showing a recent individual deposit of a much larger sum than the balance of the note, it was further held that the presumption, in the absence of all the evidence to the contrary, would be that the individual interest of the depositor was sufficient to set off such balance.—*Comfort v. Patterson*, 241.
5. In such case it seems the title and control of the deposit would be so far in the depositor personally that the addition of his official title would be a mere *descriptio personæ* not altering the rights of either party.—*Ibid.*
6. In insolvency proceedings a debt payable on demand due a creditor may be set off against a past-due claim due the insolvent.—*Seymour et al. v. Dunham*, 386.
7. A stockholder of an insolvent bank can be made to pay to the assignee his unpaid subscription, and he has no right to set off against such claim his claim against the bank as depositor.—*Macungie Savings Bank v. Bastian*, 484.

TITLE.

See ASSIGNEE, 10, 15; FACTORS; RECORD, 1.

TRUST.

See ACCOUNTING, 3, 4; ASSIGNEE, 7, 22.

TRUST DEEDS.

1. A deed of trust is given in 1870, to secure a *bona fide* debt of ten thousand dollars, evidenced by four notes, payable in one, two, three, and four years, and conveys a tract of land with the crops then upon or thereafter grown upon the land until said notes are fully paid, all stock of horses, mules, cattle, sheep, and hogs, with the increase of the same then on the said land and thereafter placed on the same, and all farming implements used in the cultivation of the said land. *Held*, 1. The deed is not *per se* fraudulent on its face. 2. *Quære*: If the crops thereafter grown upon the land, or the increase of the stock, or other stock or implements afterward put upon the land, pass by the deed, and will be protected against subsequent execution creditors? — *Brockenbrough's exrx. et al. v. Brockenbrough's admr. et al.*, 233.
2. Pending a suit by judgment creditors to set aside the deed as fraudulent, the grantor makes a deed of quit claim to his creditors of all the property conveyed in the deed: but the notes are not given up, nor is the deed of trust released. *Held*, That whether the trust is released depends upon the intention of the creditor; and in this case it was held upon the evidence there was no such intention. — *Ibid*.
3. A deed of trust to secure certain debts conveys certain real estate, and the grantor reserves in it, to himself and his family, all exemptions and property allowed by the Constitution of Virginia, and all laws passed in pursuance thereof, and in addition thereto, all exemptions allowed under the bankrupt laws. *Held*, The reservation is legal and valid. — *Ibid*.
4. Plaintiff's father died, devising his real estate to plaintiff and another son, who entered into possession of the lands so devised. Decedent's personal estate was insufficient to fully discharge his debts, and his creditors having demanded payment of the devisees, they, the individual creditors, and the creditors of the decedent, and three trustees entered into an agreement, whereby the devisees conveyed the devised land to the trustees to sell the same and to apply the proceeds to the payment of the debts therein specified, and to pay over the balance to the assignee of John D. Parsons and to plaintiff, according to their respective interests. The agreement provided that the land should be sold within eighteen months from its date, and the creditors in the same agreement released the devisees from all claims and demands. *Held*, That the release was founded upon a sufficient consideration, and that its legal effect was to discharge the debts. — *Parsons v. Rhodes*, 354.
5. The provision requiring the trustees to sell within eighteen months was a mere direction, and the property did not revert to the grantors upon the failure to sell within the time directed. — *Ibid*.

UNITED STATES.

See PRIORITY, 2.

